FUNDAMENTALISM, POLITICS, AND THE LAW

Edited by
MARCI A. HAMILTON
AND MARK J. ROZELL

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Contents

Foreword
Religious Fundamentalism and the Global Resurgence

John L. Esposito

The resurgence of religion, in particular that form of religious revivalism popularly referred to as "religious fundamentalism," has had a profound impact on politics and society since the late twentieth century. The resurgence has occurred in all the world's major religions and across the world, from North America and Latin America to the Middle East and Asia. The reversal of what many had seen as an inexorable process of modernization as secularization signaled the de-secularization of societies, a major challenge in domestic and international politics and society in many parts of the world.

In the Muslim world, from North Africa to Southeast Asia, Islam reemerged as a major force in both political and social development.[1] Iran's Islamic revolution in 1978–1979 spotlighted a contemporary reassertion of Islam that had actually been occurring for more than a decade in Libya, Egypt, Sudan, Pakistan, Lebanon, and Malaysia.[2] Radical Islamic movements engaged in a campaign of violence and terror in attempts to destabilize or overthrow governments in the Muslim world. Moderate Islamists, espousing the desecularization or Islamization of society, emerged as major social and political activists.

The challenge of religious and ethnic nationalisms has been evident in South Asia. The conflict between Buddhist Sinhalese and Hindu Tamils in Sri Lanka has spanned decades. India, an ostensibly secular state, experienced multiple communal conflicts that were motivated by the challenge of religious nationalism, from Sikh demands for independence in Punjab to the rise of Hindu nationalism, particularly the militant activities of the BJP, and consequent conflict and violence with Muslims and Christians. Emergent Muslim religious nationalisms in the former Soviet Union in Central Asia have been matched

by new religio-political impulses of the Russian Orthodox Church.[3] And in the southern Philippines, Muslim factions have agitated for autonomy from a "Christian dominated" government.

In America, the Christian Right—primarily, but not exclusively, Baptist and Evangelical—emerged in the 1970s and quickly became a significant presence and force in American society, through their cable television channels and programs and their involvement in politics. Robert Grant, Pat Robertson, Jerry Falwell (the Moral Majority), and others became part of a vibrant social and political movement that claimed to champion traditional Christian values. Many emphasize that America is a Christian nation and believe in a literal interpretation of the Bible. The Christian Right movement quickly became a major force in American politics, advocating a conservative political agenda with fundamentalist orientation. Movement leaders and activists have actively endorsed presidential, congressional, and judicial candidates, and promoted and lobbied for a variety of issues and legislation.

Return to the Fundamentals: An Ideological Worldview

Common to contemporary fundamentalisms is a quest for or reassertion of religious identity, authenticity, and community, and a desire to establish greater meaning and order in both personal life and society. Many have turned or, more precisely, have returned to (been reborn or born again) their religious tradition, reaffirming the relevance of religion not only for the next life but also for this one. Most share a common desire to return to the foundations or cornerstones of faith. They reemphasize the primacy of divine sovereignty and the divine-human covenant, the centrality of faith, and human stewardship. Revivalist movements see religion not simply as a code of belief restricted to private life, but as a total way of life. These movements critique the status quo, often characterized as liberal, left, secularist, or godless and demand substantive reform. Most seek to bring about change from below—to reform, rather than violently overthrow, governments and societies. All reread sacred scripture and look to lives and actions of founders and prophets and to the example of the early faith community. Major religious events are reinterpreted to demonstrate their relevance to modern conditions. The exodus of Jews from Egypt, the crucifixion and resurrection of Jesus, the Muslim *hijra* from Mecca to Medina, and their *jihad* (struggle) against injustice, all are age-old sources for divine guidance and liberation from oppression in the modern world. Thus, for example, revivalists of the three

Abrahamic faiths maybe said to seek, in their views, to re-Islamize, re-Christianize, or re-Judaize their religious communities and societies.

Despite their differences, fundamentalists, for example Christian and Muslim, share common concerns and causes. Their reassertion of traditional values, especially family values, often translates into a reinforcement of patriarchal values. Women, as wife and mother, are the "culture bearers," primarily responsible for the preservation of family and culture. Their pro-family and pro-life agenda emphasize family, sexual, and reproductive issues and values. These include the sanctity of the nuclear family and children; a stand against abortion, gay rights, sex education in public schools, and the teaching of evolution; support for creationism or intelligent design, home schooling, and prayer in schools; and the promotion of faith-based initiatives or social agenda.

The vast majority of fundamentalists do not believe that they are retreating from the world to live in a distant past. Neither do they seek to live in premodern societies bereft of the benefits of modern science and technology. Indeed, modern technology has been harnessed to organize and mobilize mass support, as well as disseminate the message of religion and sociopolitical activism. The widespread use of radio, television, audio and videocassettes, DVDs, computers, fax machines, and the Internet have enabled effective communication nationally and transnationally. Thus, technology and communications have not simply been the purview of modern, secular culture, but rather, of a revitalized and, in some instances, transnational religious culture.

Religion and the State

Although many Muslims and Western governments talk about democracy, self-determination, as understood by the majority of Muslims polled, does not require a separation of church/religion and state. The 2007 Gallup World Poll of Muslims from Morocco to Indonesia found that large Muslim majorities cite the equal importance of Islam and the importance of democracy as critical to the quality of their lives and the future progress of the Muslim world.[4]

The desire for more Islamically oriented states and societies is accompanied by a call for the reimplementation of Shariah, Islamic law. Despite significant differences in interpretation and implementation, Shariah law is generally associated with so-called fundamentalist states such as Saudi Arabia, Sudan, Iran, Pakistan, and Taliban rule in Afghanistan. More surprising was the demand for Shariah that accompanied the drawing up of the new constitutions in post-Saddam Iraq and in post-Taliban Afghanistan. What emerged was the fact that

Muslims in many countries want some form of Shariah in their constitutions. The Gallup World Poll found:

- An overwhelming majority wanted Shariah as a source of law, disagreeing with the statement that the Shariah should have no role in society.
- In most cases, only a minority wanted Shariah as "the only source" of law. Jordan, Egypt and Pakistan represented exceptions where majorities wanted Shariah as the "only source" of legislation.
- Perhaps most surprising is the general absence of any large difference between the responses of males and females supporting Shariah. Among those who said Shariah must be the only source of legislation, there was almost no difference between women and men in all countries. (The one exception was Pakistan where the introduction and especially the application of what were called Shariah laws or regulations have often eroded women's rights in family law, adultery, and rape cases.) For example, in Jordon 54 percent of men and 55 percent of women want Shariah as the only source. In Egypt, it's 70 percent of men and 62 percent of women, in Iran, 19 percent of men and 14 percent of women, and in Indonesia, 19 percent of men and 21 percent of women.

Although in the popular mind, Shariah is associated with theocracy, religious or clerical rule, responses to the Gallup poll indicate that desire for Shariah does not translate into a call for a theocracy. A sizeable majority of respondents say they would want religious leaders to play no direct role in

- drafting the country's constitution,
- writing national legislation,
- drafting new laws,
- determining foreign policy and international relations
- deciding how women dress in public or what is televised or published in newspapers.

The vast majority of those who want Shariah as well as democracy also said they support woman's rights and agreed with the statement that women should have

- the same legal rights as men (88 percent in Iran; 90 percentile range in Indonesia, Bangladesh, Turkey and Lebanon; 76 percent

in Pakistan; and surprisingly 61 percent in Saudi Arabia) Surprisingly Egypt (61 percent) and Jordan (57 percent), which are generally seen as more liberal, lagged behind Iran, Indonesia, and other countries.
- rights to vote, drive and work outside home: 95 percent in Indonesia, 88 percent in Iran, 76 percent in Pakistan, 90 percent in Bangladesh, 92 percent in Turkey, 61 percent in Saudi Arabia, and 57 percent in Jordan said women should be able to vote without any influence or interference from family members:
- the right to hold any job for which they are qualified outside the home. Indonesia had the highest percentage (90 percent); Iran, Turkey, Bangladesh, Morocco, and Lebanon scored in the 80 percentile range, followed by Egypt (78 percent), Saudi Arabia (69 percent), Pakistan (62 percent), and Jordan (61 percent).
- the right to hold leadership positions at cabinet and national council levels. While majorities supported this statement, Saudi Arabia was the exception (40 percent).

Many in the West, and certainly in America, believe that separation of church and state is integral to democracy. Thus, any talk of the role of religion or of Shariah is seen as antithetical to modern democracy. Yet, in the United States, a Gallup poll taken in 2006 found that a majority of Americans indicated that they want the Bible as a source of law.

- 44 percent say the Bible should be "a" source and 9 percent of Americans believe it should be the "only" source of legislation.
- Perhaps even more surprising, 44 percent of Americans want religious leaders to have a direct role in writing a constitution while 55 percent want them to play no role at all. These findings (numbers) are almost identical to those for Iran!

Fundamentalism, Religious Extremism, and Terrorism

The global resurgence of religion has seen radical forms of religion become a primary vehicle for both government and antigovernment legitimation for acts of violence and terror in Algeria, Egypt, Sudan, Indonesia, India, Iran, Israel, Thailand, Uzbekistan, and elsewhere. In many ways, it is what Marxism and radical forms of secular nationalism and socialism were in the past, an ideological alternative to the established order, a form of liberation, resistance, guerrilla warfare, violence, and regional or global terror.

Fundamental to an understanding of the role of religion and its relationship to violence and terrorism is an appreciation of the fact that all religions have both a transcendent and a "dark side." Religion is about a transcendent (divine, absolute, or ultimate) being or reality. It enables believers or practitioners to achieve levels of self-transcendence. All have been sources of peace and social justice. However, historically, religion has also been used to wage war or suppress dissent.

Modern forms of fundamentalism have their mainstream and extremist, nonviolent and violent forms. I sometimes distinguish between the mainstream Christian Right or Wahhabi Islam with their more exclusivist theologies that are weak on religious pluralism and tolerance (vis-a-vis other faiths as well as alternative theological interpretations or orientations within their own faith tradition) and the militant forms of the Christian Right and Wahhabi Islam with their theologies of hate. While the former do not advocate violence and terror, militants, who transform exclusivist theological worldviews into theologies of hate that legitimate acts of violence and terrorism, can appropriate their theological worldviews.

While all the so-called world religions have a history and track record of religiously legitimated conflicts, violence, and terror, the three monotheistic Abrahamic traditions (Judaism, Christianity, and Islam) have more striking track records than other religious traditions. Their belief in their special revelation and covenant with the one true God, a sacred land or territory, and, in the case of Christianity and Islam, universal mission, have been more prone to exclusivist theologies/worldviews that can be used by political and religious leaders to legitimate imperialist expansion, violence, and terror.

For militant fundamentalists, their theological worldview is not simply an ideological and political alternative but an imperative. Since it is God's command, implementation must be immediate, not gradual, and the obligation to implement is incumbent on all true believers. Those who remain apolitical or resist—individuals or governments—are no longer regarded as believers but rather as atheists or unbelievers, or enemies of God, against whom all true believers must wage a holy war. Moreover, acts normally forbidden—stealing, murder, and terrorism—are seen as required. They are religiously legitimated in what is portrayed as a cosmic war between good and evil, between the army of God and the forces of Evil/Satan. Militant theologies or ideologies are then used by these unholy warriors to justify blowing up abortion clinics or government buildings, such as the FBI building in Oklahoma City, the Twin Towers of the World

Trade Center, and the Pentagon, and suicide bombings by Muslim extremists in Israel/Palestine and Iraq.

Religiously motivated or legitimated violence and terror adds the dimensions of divine or ultimate authority, religious symbolism, moral justification, motivation and obligation, certitude, and heavenly reward that enhance recruitment and a willingness to fight and die in a sacred struggle. Though not necessary, it certainly is enormously advantageous for religious terrorism to be approved or legitimated in the name of God, often by sacred texts or religious leaders. This has been the case in the past and is certainly the case in modern times, from Yigal Amir, the assassin of Israel's Prime Minister Yitzak Rabin, to Osama Bin Laden and Indonesia's Jamaat-e-Islami. A sacred text or a statement by a member of a religious hierarchy (pope, ayatollah, chief rabbi) or a religious figure (priest, minister, rabbi, imam, or mufti) enhances legitimacy or the moral justification for actions. Whether these are authentic uses of religion or the hijacking of a religious tradition is a contentious point today. Analogously, even among liberal mainstream believers, there is a tendency to feel more secure when a religious figure or member of the clergy endorses the position of a "lay" leader or theologian, however prominent.

Understanding the relationship of religion to politics and society, domestic and global, remains critical in the twenty-first century. All current indices indicate that for the foreseeable future in many parts of the world, religion will continue to be a significant presence and force in identity politics. Religion remains a source of identity, values, and morality in America and many parts of the world. Religious fundamentalisms impact domestic politics and issues of gender equality, family, sexuality and reproductive rights, education, social welfare, and foreign policy. At the same time, religion in the hands of extremists and terrorists remains a serious threat to stability and security in America, Europe, and other parts of the world.

Notes

1. For comprehensive coverage of the role of Islam in modern social and political development, see *The Oxford Encyclopedia of the Islamic World*, ed. John L. Esposito (New York: Oxford University Press, 2009).
2. John L. Esposito, *The Future of Islam* (New York: Oxford University Press, 2010); John L. Esposito et. al, *Asian Islam in the 21st Century* (New York: Oxford University Press, 2007); Graham Fuller, *The Future of Political Islam* (New York: Palgrave Macmillan, 2004); John O. Voll, *Islam: Continuity and Change in the Muslim World* (Syracuse,

NY: Syracuse University Press, 1995); and Fred R. von der Mehden, *Religion and Modernization in Southeast Asia* (Syracuse, NY: Syracuse University Press, 1986).

3. For an attempt at a global perspective on religious fundamentalism, see the multiple volumes edited by Martin E. Marty and R. Scott Appleby published by the University of Chicago Press, beginning with the first volume *Fundamentalisms Observed* (Chicago: University of Chicago Press, 1991). See also Karen Armstrong, *The Battle for God* (New York: Ballantine Books, 2001); and Mark Juergensmeyer, *Terror in the Mind of God: The Global Rise of Religious Violence*, 3rd ed. (Berkeley: University of California Press, 2003).
4. The discussion of Gallup World data comes from John L. Esposito and Dalia Mogahed, *Who Speaks for Islam? What a Billion Muslims Really Think* (New York: Gallup Press, 2008).

Introduction

Fundamentalism, Politics, Law

Marci A. Hamilton and Mark J. Rozell

There was a spate of academic literature in the 1980s and 1990s that examined the rise of religious fundamentalism in the United States. Much of the literature was a reaction to the Moral Majority's entrance into the political sphere in 1979, which energized a wave of political movements, including those that were anti-abortion rights, anti-evolution, and anti-secularism. The focus of the scholarship at that time was on the emergence and growing influence of the largely fundamentalist Protestant-led Christian Right.

In the latter part of the twentieth century, during the Bill Clinton Administration, interest in the rise of fundamentalist movements somewhat waned. By the end of the Clinton era, some observers of the Christian Right speculated about the ultimate demise of the movement. Even some movement leaders, such as Paul Weyrich, talked openly about whether Christian conservatives should withdraw from politics altogether. Yet the election of George W. Bush as president in 2000 triggered renewed interest in the influence of the Christian Right and fundamentalist activism in U.S. national politics. And then with the events of September 11, 2001, fundamentalist religious beliefs—this time Islamic—demanded front-page attention.

Throughout the George W. Bush era there was intensified interest in the topics of Christian Right political activism in the United States and the growing impact of Islamic movements around much of the world. Domestically and abroad, it appeared that the rising impact of religious fundamentalism was inflaming increasingly heated debates and controversies. Although President Barack Obama has spoken

forcefully about the need to overcome religious divisions both within the United States and in the nation's foreign relations, there remain entrenched fundamentalist movements that work strongly against such efforts to build bridges between peoples.

This volume provides students and scholars with a collection of essays documenting and responding to the modern rise of fundamentalist movements in politics and law. The term "fundamentalism," although controversial in some sectors, is widely used in academic and common discourse. The *American Heritage Dictionary of the English Language* (4th edition) defines fundamentalism as "a usually religious movement or point of view characterized by a return to fundamental principles, by rigid adherence to those principles, and often by intolerance of other views and opposition to secularism." Every religion (and every political leaning) has its fundamentalist branches, which have a "basic principle" that religious belief trumps secular law, or the rigidity of the belief structure makes it difficult for the believer to comfortably live with competing laws. Public figures such as former president Jimmy Carter, journalist and best-selling author Thomas Friedman, and leading scholars such as John L. Esposito in this volume, posit that fundamentalism is on the ascendancy worldwide now in the early part of the twenty-first century.

It is thus an important time to study the phenomenon of fundamentalism. In the United States, the Christian fundamentalist political movements that mobilized into political action in the 1970s and 1980s are now interwoven into our political fabric. Enough time has passed for distinguished scholars to investigate the historical and political development of these movements and to analyze them. There is much in this collection to mull over, consider, and debate. The chapters are intended to spur a lively discourse among students, scholars, and anyone else who is interested in religion and public policy. As with all good debates about religion, this collection brings to bear a wide variety of approaches and views. The collection is comprised of chapters that are written by highly respected scholars of political science, sociology, religion, and law.

The very use of the word "fundamentalism" sometimes precipitates heated debate. Some observers are quick to assume that the term is intended as a pejorative rather than a description. The Christian Right's political battles since the 1980s have tarred the term "fundamentalism" to some degree, and, therefore, some, especially in the movement, might prefer "literalist" (or some other word). Yet the introduction of new terms will not lend more clarity to our analysis or reduce the inevitable contentiousness surrounding these

issues. In this case, "fundamentalism" remains the best term for the phenomenon described and analyzed in these chapters. Part of the sensitivity to the term arises from the general cultural taboo of talking negatively about religion, or merely just being perceived in any way as negative toward religion, which was the primary subject of Professor Hamilton's book, *God vs. the Gavel: Religion and the Rule of Law.*[1]

Indeed, at times there has been a dearth of frank and honest discussion about religion in the United States, though there has been a wave of *anti*-religion books published recently, such as Sam Harris's *The End of Faith: Religion, Terror, and the Future of Reason*,[2] Richard Dawkins's *The God Delusion*,[3] and Christopher Hitchens's *God Is Not Great: How Religion Poisons Everything.*[4] These provocative books have directed substantial public attention to controversies surrounding the role of religion in contemporary society. But they have also taken the discussion off-track, because history makes clear that religion is an immovable aspect of human existence. Better that we speak truthfully about it than that we delude ourselves into believing that it can be or ever will be discarded.

Beyond these anti-religion publications, most media and individuals in the United States continue to be overly sensitive about the subject of religion in just about every context, as though it would wither away if a spotlight were shone on it. Instead of candid talk about religion, we cycle between set positions and sound bites without arriving closer to the truth. This collection is intended to bring more light to some admittedly thorny issues in U.S. culture.

The scholars were chosen for their distinguished reputations and their previous, important contributions to the related literature, without reference to politics, and certainly not to obtain a certain or perfect balance of viewpoints in the end product. The chapters speak for themselves, and while a collection can always be faulted for what it may not include, this volume is rich with cutting-edge ideas, empirical research, and data. Therefore, the reader is intended to leave with more questions than she had when she first opened the volume.

The chapters in this volume are divided into two major sections: the first on U.S. Protestant fundamentalism and the second on fundamentalism in several of the other major religious traditions (Islam, Judaism, Mormonism, and Catholicism). The overall collection is not intended to be a comprehensive treatment of contemporary controversies over religious fundamentalism in politics and law, but rather representative and instructive on a number of key topics. We encouraged the contributors to give voice to their own informed views on the controversial subjects they have addressed here. If in so doing

they generate some spirited debate and even serious disagreement, then they have done exactly what we wanted them to achieve.

The first section on Protestant fundamentalism in the United States begins with a description and analysis of the rise of Christian conservative political activism. Indeed, over the past three decades, the most intense social movement–based activism in politics and law in the United States has come from the Christian Right. That movement generally is comprised of evangelical and born-again Christians who are socially conservative and politically active. Although the movement has attempted to reach beyond its conservative evangelical base, it has drawn its energy heavily from Protestant fundamentalists who previously had mostly eschewed political activity.

As Clyde Wilcox, a long-time leading scholar of the Christian Right observes in Chapter 1, in the 1970s this resistance to direct political action had started to change. He shows that at that time, prominent secular conservative leaders convinced some leading conservative religious figures to become openly engaged in political activity. The hope was that a new conservative majority would emerge in the United States—one that would unite free market enthusiasts, anticommunist advocates, and religious conservatives. Guided by prominent conservative Protestant-led organizations such as the Moral Majority in the 1980s and the Christian Coalition in the 1990s, the Christian Right became a key player in the Republican Party victories for the White House in the Reagan-Bush and Bush II eras and for Congress in the Clinton and Bush II eras.

As Wilcox maintains, this social movement, written off by critics many times as a spent force in U.S. politics, has shown great resilience and persistence. The Christian Right nonetheless has had much more success in electoral politics than in the public policy arena. After more than three decades of active political engagement, the Christian Right has had some limited policy successes but has experienced far more frustration than advancement of its core agenda.

For the Christian Right, the key policy arena has been the life issues, especially abortion. The newly mobilized Christian Right of the 1970s and 1980s fought hard for a constitutional amendment to prohibit abortion; and it focused much of its effort as well in electing Republican presidents who presumably would appoint pro-life judges committed to overturning the controversial Supreme Court decision in *Roe v. Wade* (1973).

After bitter disappointment with what they considered the lack of social issues movement in the Reagan and first Bush administrations, many leaders in the Christian Right urged a more politically pragmatic

strategy of reducing abortions through such secondary restrictions as parental notification, parental consent, limiting late-term abortions, and prohibiting use of public funds for abortion-related services. Although the Christian Right today remains disappointed in its inability to achieve the goal of eliminating abortion rights, the movement's efforts have nonetheless paid off in helping to enact a significant number of state-level restrictions on abortion.

Religious fundamentalists in the United States have devoted enormous effort over the years toward trying to influence public education. Their activism has had important influences on what is taught in many schools about the origins of the human race and also in sex education. These two areas of deep contention are the topics of chapters 2 and 3 by, respectively, David Masci and Susan D. Rose.

In Chapter 2, Pew Forum senior fellow David Masci describes and analyzes the history of the debate over the theory of evolution in the United States. Although Charles Darwin published his theory of evolution by natural selection more than 150 years ago, the controversy surrounding his groundbreaking idea has not abated—at least in the United States. All but a tiny fraction of scientists accept evolutionary theory. Nonetheless, many Americans, particularly religious fundamentalists, still do not believe that Darwin's theory best explains the development of life on Earth. Furthermore, many oppose the teaching of evolution in public schools. In the last decade alone, dozens of state and local legislatures and school boards have considered and, in some cases, enacted changes to school science curricula in an effort to alter how evolution is presented to students. Courts also have been involved in determining whether these changes violate the constitutional prohibition on the establishment of religion.

In Chapter 3, sociologist Susan D. Rose examines the controversies and legal challenges that have accompanied federal funding of abstinence-only-until-marriage programs and policies in public schools. Her chapter focuses both on the content and consequences of sexual abstinence-only programs and on the role and power of conservative religious groups in shaping public policy, especially as it relates to education, reproductive and sexual health, and family issues.

Since 1996, over $1 billion in state and federal funding has been allocated for abstinence-only education despite a lack of evidence supporting the effectiveness of this approach. The United States continues to have the highest teen pregnancy and abortion rates in the industrialized world. Rose's analysis of the research on abstinence-only programs indicates that abstinence-only proponents not only

provide medical misinformation and promote fear and ignorance, they also fail to plan, fund, and implement effective social policy that could more effectively curb the very high rates of teen pregnancy, abortion, and the spread of STDs.

Christian Right leaders and activists at times have justified injecting certain moral beliefs into public policy because of their view that the United States is a "Christian nation." As law professor Frederick Mark Gedicks and scholar Roger Hendrix maintain in Chapter 4, although it is true that a strong majority of U.S. citizens identify themselves as Christians, the country is an increasingly religiously pluralistic society. Thus, they warn against recent efforts to narrow the scope of legal protections of religion or to ensconce into the law the notion that the United States is guided specifically by Judeo-Christian morality.

As Gedicks and Hendrix further explain, the most recent incarnation of American civil religion is the Judeo-Christian tradition, which emerged in the 1950s as a set of spiritual values that was thought to be held by virtually all Americans. However, Judeo-Christianity no longer reflects the religious beliefs of all or nearly all Americans, if it ever did. Increases in unbelievers, practitioners of non-Western religions, and adherents to postmodern spirituality now leave large numbers of Americans outside the boundaries of Judeo-Christianity.

As religious demographic trends have expanded American religious diversity, political forces are contracting these same boundaries. In recent decades, conservative Christians have succeeded in projecting thick, sectarian meaning onto the purportedly inclusive symbols and observances of Judeo-Christianity, even as they continue to rely on the thin religiosity of civil religion to circumvent Establishment Clause limitations on government use of those symbols and observances. The contemporary ethic of religious equality that now informs Establishment Clause jurisprudence could regress into one of classic tolerance, under which the government would be constitutionally free to use a purportedly inclusive Judeo-Christian civil religion to endorse a sectarian Christianity.

Gedicks and Hendrix conclude that, even with enormous religious diversity, liberal democracy in the United States functions because of the separation of government from thick conceptions of the good. Insistence on an American democracy informed by Judeo-Christianity or, indeed, by any civil religion, is the wrong approach in a society characterized by religious diversity.

In Chapter 5, law professor Steven K. Green takes up the enduring constitutional controversy over the practice of the government-funding

programs of religious social service agencies. Although commonly portrayed as a George W. Bush–era initiative, it was during the Bill Clinton Administration that the federal government began the "Charitable Choice" program. The idea of giving public funds to religious organizations to engage in charitable activities closely related to their religious ministries has raised Establishment Clause concerns. Still, with sufficient safeguards, Charitable Choice had the promise of enhancing public-private partnerships while expanding the availability of much-needed services.

As Green observes, the George W. Bush Administration squandered that promise when it transformed Charitable Choice into the "Faith-Based Initiative," and thus turned an already suspect program into a partisan political tool to appease conservative evangelicals. Rather than ushering in a new era of positive church-state collaborations, the Bush Faith-Based Initiative left a different legacy: damage to the previously workable relationship between the government and religiously affiliated charities and heightened suspicion about future church-state collaborations.

Although debates about the role of fundamentalism in politics and law in the United States tend to center around the activities of the largely Protestant-led Christian Right movement, significant issues surround the impact of fundamentalism in various other religious traditions. The chapters in section 2 examine key issues and controversies over religious fundamentalism in Islam, Judaism, Mormonism, and Catholicism.

In Chapter 6, political scientist Brian Robert Calfano takes up the question of maintaining a Muslim religious identity in a political environment that is ostensibly unsupportive of, and perhaps hostile to, Islam. At issue is the personal orientation individual Muslims have for bridging the distance between what their faith demands in terms of personal devotion and democratic values, and what they are able to live out in the context of American society. Calfano draws on two theological frameworks grounded in an interpretation of Islamic theology that may serve as the basis for understanding how Islamic devotion—termed here "fundamentalism"—may be realized in an environment that would be considered either hostile to Islam, or generally nonreligious in nature.

In seeking to understand how individual Muslims navigate the choices inherent in pursuing personal fundamentalism while effectively functioning in a social construct with little in the way of religious support, the chapter examines focus group data from Muslims living out this reality. Group data suggest that Muslims in

these settings make compromises, the most important of which is not seeking some type of collective recognition of their faith community from the larger community, even as these Muslims look for small ways in which to further the principles of an Islamic democracy.

In Chapter 7, sociologist Hella Winston explores the recent conflict that erupted in New York City between the government and the ultra-Orthodox Jewish community over the latter's ritual practice of *metzitzah b'peh*, or the suctioning of blood from the circumcision wound directly by mouth. Implicated in the deaths of several infants, the practice came under scrutiny by the city's health commissioner, who then attempted to educate the ultra-Orthodox community about the practice's health risks, and potential alternatives. The ultra-Orthodox community met this effort with outrage and staunch resistance. Many—including the health commissioner—treated this reaction as evidence of that community's lack of medical and scientific knowledge, stemming from "cultural differences."

Winston argues, however, that it was not an ignorance of science or medicine that was behind the community's reaction, but a desire to defend and maintain its boundaries - not only against unwanted government intrusion into its way of life, but also against other "denominations" of Judaism that do not subscribe to the practice of oral suction. She further posits that, as long as the health risks to the community are perceived to be relatively low, this practice will continue unchanged, as the maintenance of strong communal boundaries is ultimately more important to the community than the lives of individual children.

In Chapter 8 on fundamentalist Mormon polygamy, sociologist Stephen A. Kent identifies the leading reasons why he and others endorse efforts to prosecute polygamy as a crime. These reasons include the potential of harm to the health and welfare of girls and young women; the high occurrence of incest; the issue of infant deaths and genetic deformities; and the human rights issues related to the frequent fundamentalist Mormon practice of arranged marriages. In addition, older men typically displace many young men out of polygamous communities, and often these communities rely upon welfare fraud and state support in order to operate. The state, in turn, has vested legal interests in maintaining monogamous marriages as legal entities, and the authoritarian, theocratic operation of polygamous communities threatens the rights of citizens within pluralistic, democratic states like the United States and Canada.

In Chapter 9, Thomas P. Doyle, J.C.D., C.A.D.C., a pioneering canon lawyer, examines how fundamentalist strands in the Roman

Catholic tradition have come to the fore in the midst of the clergy sex-abuse crisis. The Roman Catholic Church has faced withering problems involving clergy sexual abuse, and Fr. Doyle attributes a significant part of those difficulties to fundamentalist interpretations of Catholic doctrine and their clash with the rule of law.

Fr. Doyle explains that fundamentalism in the Catholic Church is not equated with a movement grounded in a literal interpretation of the scriptures nor in fervent theological and moral orthodoxy. Rather, it is expressed most clearly in the different strands of the "Traditionalist" movement that came into being in reaction to Vatican Council II. The goal of Catholic fundamentalism is to recreate or restore the Catholic culture that was dominant in the pre-conciliar era. The Church of that era was publicly expressed through its excessive clericalism, its priest-centered liturgies, its theological and moral absolutism and its legalism. Canon Law, the Church's legal system, dominated the administrative and pastoral life of the Church. It was a "sacred" system controlled by the clergy and in service to the hierarchy.

The Catholic world was caught up in the social and cultural upheavals of the Vietnam and post–Vietnam era. The fundamentalist reaction took on a new life with the papacy of Pope John Paul II, which spanned over a quarter century. Early on in his papacy (1984), the clergy sex-abuse scandal erupted in the United States and in time spread to the Church in other countries. The reaction to the scandal from inside and outside the Church has brought about a scrutiny of the Church's governing system, which is entwined in its clerical culture. Throughout this period the Catholic Church has been going through a massive paradigm shift. The fundamentalist forces have sought stability by recreating the appearance of the long-gone world of clerical triumphalism. At the same time the sex-abuse scandal has accelerated the shift primarily because it has caused the erosion of deference traditionally given to the pope and bishops.

The clerical enclave has been under constant attack not only because it is perceived to have created scores of sexually dysfunctional clerics, but mainly because it is the seat of the hierarchical system that has enabled the sexual perpetrators through its self-serving responses. The impact of the scandal and the reaction to the paradigm shift through a restored legalism have resulted in a deeply rooted conflict that may well be resolved by the ascendance of a mature and far less docile laity and the gradual dismantling of the monarchical model of the Church.

The volume closes with a description and analysis of one arena within which the differences between fundamentalism and mainstream

religions are not stark: the handling of child sex abuse. A number of religious organizations hold beliefs that mandate secrecy regarding child sex abuse, which have contributed directly to the creation of cycles of child sex abuse within those organizations. In Chapter 10, Marci A. Hamilton delineates the rules of secrecy that have shaped how the Roman Catholic Church, the Church of Jesus Christ of Latter-Day Saints, and the Fundamentalist Church of Jesus Christ of Latter-Days Saints deal with child sex abuse within the organization.

Rules against scandal preserve the organizational goal of avoiding public and legal scrutiny, but also make it difficult for those otherwise responsible for child safety, including prosecutors, state child-service agencies, teachers, and others, to perform their societal roles. Thus, without legal reform that forces such issues into the sunlight, children cannot be safe.

Each chapter challenges prevailing assumptions and encourages the reader to look under the surface and more deeply into the contemporary controversies generated by fundamentalist religious beliefs and practices. We hope that this volume increases knowledge, understanding, and pathways to peaceful discourse on difficult issues.

We thank the authors for their insightful chapters, the Floersheimer Center for Constitutional Democracy at Cardozo School of Law for hosting the original symposium that generated several of the papers, and the editors of Palgrave Macmillan for making the publication of these important analyses possible.

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Part I

Contemporary Studies of United States Protestant Fundamentalism

Chapter 1

Premillennialists in the New Millennium: The Christian Right in the United States

Clyde Wilcox

In the early days of the 2008 presidential election cycle, it appeared that the Christian Right would once again play a major role in the Republican nomination process. All of the GOP candidates appeared at the 2007 Values Voter Conference, including even former New York Mayor Rudy Giuliani, whose views on gay rights and abortion were clearly unpopular with the assembled crowd. Later, during a GOP presidential debate, the candidates were asked if they believed in the theory of evolution; three of the ten candidates raised their hands to signal their dissent from the theory.

But ultimately Christian Right groups were unable to agree on a candidate. Although former Baptist pastor (and Arkansas governor) Mike Huckabee won the Iowa caucuses, the Republican nomination ultimately went to the GOP candidate that many in the Christian Right hated most—John McCain. McCain chose the Christian Right favorite, Alaska governor Sarah Palin, as his running mate, but she quickly became the subject of ridicule and ultimately cost the ticket votes. In the end, Democrat Barack Obama not only won the presidency, but he carried several southern states that have been the bastion of the Christian Right, and won the votes of many young evangelicals as well.

Some journalists quickly declared the death of the Christian Right. But journalists and scholars have over the past thirty years alternately

described the movement as powerful and powerless, resurgent and dying. In the late 1980s, as the Moral Majority collapsed and Rev. Pat Robertson mounted a presidential bid, sociologists offered starkly different views of the movement—one that Robertson might actually win the presidency, and the other that the Christian Right had already failed.[1] Both views turned out to be wrong. Robertson spent more money than any other GOP presidential candidate in 1988 but he never seriously contended for the nomination. And soon after his defeat, Robertson launched the Christian Coalition.

For more than thirty years, the Christian Right has sought to mobilize fundamentalist Christians and other religious conservatives into political action. Like other social movements, the Christian Right has used a variety of tactics including protests, lobbying, and litigation. But more than any other major social movement in the last century, the Christian Right has focused its energies on electoral politics, reasoning that the only way to change social and moral policy is by changing politicians. The movement has been paradoxically very successful in the electoral arena, but has had far less success in public policy.

The Christian Right sought to mobilize a particular constituency—white Protestant evangelicals, and especially fundamentalists and Pentecostals.[2] This target constituency was difficult to mobilize in part because of religious doctrine. Many fundamentalists and Pentecostals are premillennial dispensationalists, who believe that the world must worsen until it reaches a critical stage and Christ comes again. This belief means that political action is doomed to futility, and that keeping separate from the sinful secular world is more important than mobilizing in politics.

Yet the Christian Right did mobilize, and it has worked assiduously to influence public policy. The movement played a major role in the GOP victories in the 1994 congressional elections, and in George W. Bush's victories in the 2000 primary nomination battle against John McCain and in the 2000 and 2004 general elections.[3] There is some evidence that the movement increased voting among evangelicals, and helped sway these new voters to the GOP.[4]

The current iteration of the Christian Right began its activities in 1978, three decades before the 2008 elections. It is therefore a useful time to take stock of the Christian Right. How did it mobilize, and how did its tactics change over time? What did it accomplish, and what other effects did the movement have on politics and society? Finally, what is the likely future of the movement?

Social movements are always difficult to assess, since they have competing leaders and organizations with different ideologies and

policy programs. But the Christian Right has been especially complex, because it has had overlapping waves of social movement mobilization, both at the national and state levels.[5] Over the past thirty years, two different organizations have achieved the greatest prominence, only to fade into the background. To fully understand the Christian Right in American politics, it is important to first examine three distinct periods of mobilization, and then to step back and take stock across the entire period.

The Moral Crusades: 1978–1987

Jimmy Carter's victory in the 1976 presidential election signaled the possibility of mobilizing fundamentalist and evangelical Christians into politics. Fundamentalists in particular had previously exhibited low levels of political participation, in part because of their socio-economic status but also in part because of their religious doctrine. Although many were proud to back an openly Born-again Christian for president, Carter's policies disappointed and angered many fundamentalists.

By the middle of Carter's term, secular conservative leaders reached out to evangelicals and fundamentalists as a promising constituency to mobilize on behalf of Ronald Reagan's presidential bid, both within the Republican Party and in the general election.[6] They supplied resources to help form a number of political organizations that targeted specific religious constituencies.

These new Christian Right groups worked hard to register new evangelical voters and to help Reagan in key states. Reagan would likely have won without their help, but he did appoint key Christian Right figures to relatively low level administrative posts and use his rhetoric to support some of the movement's agenda. But ultimately, Reagan spent few political resources promoting Christian Right policies, and was especially quiet when Congress voted on a constitutional amendment to allow prayer in public schools.[7]

The Christian Right of this period included a number of organizations, including Concerned Women for America (CWA), Christian Voice, and Religious Roundtable, but the most prominent of these organizations was the Moral Majority, headed by Bible Baptist Fellowship preacher Jerry Falwell.[8] Falwell was one of the most successful religious leaders in a denomination that depended on religious entrepreneurs forming their own churches. He had started out with a congregation that met in his home, and built it into a congregation of more than 15,000. His "Old Time Gospel Hour" had a large following

on Christian television. Falwell agreed to head the Moral Majority, and quickly built an organization that had chapters in most states.

The Moral Majority expanded primarily through the Bible Baptist Fellowship's religious network, although some states had chairmen from other independent Baptist denominations.[9] This approach allowed the Moral Majority to quickly expand, but the religious particularism of these independent Baptists kept the organization from effectively reaching other conservative Christians. Surveys showed that most members of state chapters of the Moral Majority were independent Baptists, and that there were few Pentecostals or other evangelicals, fewer mainline Protestants, and practically no Catholics.[10]

The Moral Majority managed to mobilize its premillennialist members into political action by arguing that although defeat was inevitable there were important issues at stake in the short run. Falwell argued that Christians had an obligation to "fight the good fight," and played to his members' strong nationalism. Moral Majority members were somewhat "reluctant warriors" who overcame their historical hesitations about political involvement, but who retained their belief that politics could not solve social problems.[11]

Although there were on paper state chapters in nearly every state and county chapters in many states, these organizations were largely inactive. Although many state chapters claimed many members, scholars reported that membership lists were short. The national organization had a much larger list, which it used to raise money through direct mail solicitations. Direct mail fundraising works best when the opposition holds the reins of power, and Reagan's victory and reelection in 1984 dramatically reduced the Moral Majority's fundraising. Falwell first tried rebranding the organization as the Liberty Forum, then announced its closing in 1986, saying that its goals had been accomplished.

Falwell's claims of success were not reflected in reality. The Christian Right of the 1970s and early 1980s failed to make progress on school prayer or the teaching of religion in public schools, on women's roles or gay rights. During the mid-1980s, many states did adopt some modest restrictions on abortion rights, including parental notification and consent, waiting periods, and "informed consent" laws that require doctors to provide certain information to potential clients. But on most issues championed by the Moral Majority, policy was either unchanged or more liberal in 1986 than it had been in 1978.

Instead, the Moral Majority and other Christian Right groups of this era primarily succeeded in becoming the object of ridicule

among moderate and liberal Americans. Jerry Falwell was in some public opinion polls the most unpopular public figure, and the Moral Majority's crusade against pornographic sugar cookies at Ocean City, Maryland, managed to increase for a time the demand for the cookies. Christian Voice drew much public ridicule when it issued Morality scorecards that rated Republicans censured for having sex with teenaged interns at 100, and ordained pastors at 0.[12]

But the Christian Right of the 1970s and early 1980s did help achieve the goals of the Republican conservative activists who served as the movement's early patrons. The Republican party did move significantly to the Right during this period, and Reagan enjoyed a Republican Senate for the first six years of his presidency. Reagan's presidency amply rewarded neoconservatives who sought a larger defense budget, and economic conservatives who wanted lower taxes. Thus, the Christian Right proved a relatively cheap coalition partner for these other conservative Republicans—one that settled primarily for symbolic reassurances.

Pastors in Politics: The Robertson 1988 Presidential Campaign

Although journalists were quick to announce the death of the Christian Right when the Moral Majority folded, about the same time Pat Robertson began his quest for the White House. Robertson was an ordained minister, and the host of a popular religious talk show *The 700 Club*. The son of a former Democratic U.S. Senator, Robertson was more politically astute than Falwell, his long-time instate rival. Robertson publicly mulled a decision to run, and asked his television audience to sign petitions urging him to run for the presidency. The resulting list served as the fundraising core of the Robertson campaign. Robertson raised more money than any other Republican candidate in 1988, including Senate Majority Leader Bob Dole and Vice President and eventual winner George H. W. Bush.

Seen by some standards, Robertson's campaign was surprisingly successful. He came in first in the initial balloting in a long multistage process in Michigan in 1987, and finished a surprising second to Bob Dole in the Iowa caucuses. George H. W. Bush, the eventual winner, was caught by surprise, and jokingly noted that his supporters in Iowa must have been at their daughter's debutante balls instead of at the caucuses. Robertson's supporters did not show up in polling before the caucus because they had not voted in past elections and often did not know precisely which day the caucus would be held—two

questions that pollsters routinely use to screen out those who are unlikely to vote in the caucus.

Robertson went on to win in several caucus states from Alaska to Hawaii, but he did very poorly in primary elections, where intensity of support is less important because voting is easier. He finished last in his home state of Virginia, and last as well in the Texas caucuses where he outspent Bush 3-1. His campaign suffered a series of setbacks, including a sex scandal of supporter Jimmy Swaggart, a libel suit that Robertson was forced to settle, revelations about the pregnancy of his wife at the time of their marriage, and a series of public gaffes.

Robertson sought to distance himself from the religious particularism that had doomed the Moral Majority. He proclaimed, "In terms of the succession of the church, I'm a Roman Catholic. As far as the majesty of worship, I'm an Episcopalian; as far as the belief in the sovereignty of God, I'm Presbyterian; in terms of holiness, I'm a Methodist; in terms of the priesthood of believers and baptism, I'm a Baptist; in terms of the baptism of the Holy Spirit, I'm a Pentecostal. So I'm a little bit of all of them.[13]

But Robertson did not ultimately succeed in overcoming the chasm that separated fundamentalists from Pentecostal and charismatic Christians. His donors and voters came primarily from the latter two groups, and many fundamentalist pastors (including Falwell) endorsed Bush.[14] He did manage to substantially increase turnout among his target constituency, however. Unlike Falwell, Robertson began to tentatively endorse a postmillenialist theology that held that the millennium of perfect peace would occur *before* the second coming of Christ. The implication of this doctrine is that conservative Christians must be very active in politics, in order to bring about the millennium.

Having spent a record amount on the campaign, Robertson received only 35 first ballot votes at the GOP convention. But he had many more delegates than votes, because his campaign worked hard during the complicated process of delegate selection. During the process, Robertson's followers won control of many state Republican parties.[15] And from the ashes of his defeat arose the Christian Coalition, the most visible and active organization during the next decade.

Pragmatism and Partisanship: The Christian Right 1989–1998

During the 1980s as the Moral Majority collapsed, other organizations were becoming active. CWA continued its mobilization of fundamentalist and evangelical voters. Focus on the Family, the radio ministry

of Dr. James Dobson, formed state affiliates and was instrumental in forming the Family Research Council. But the organization that received the most attention in the 1990s was the Christian Coalition.

In the 1970s and early 1980s the Moral Majority achieved the greatest attention because of Falwell's media skills, but also because his organization was more active and influential than others formed during the same time. This was not true of the Christian Coalition, however. CWA grew in influence during this period, but its leader Beverly LaHaye did not seek media attention. Focus on the Family operated primarily through state units that often had different names, and were therefore under the media radar. But in Virginia, the state affiliate of Focus was far more active and influential than the state Christian Coalition chapter.[16] And Family Research Council served primarily to disseminate research by conservative Christians.

The Christian Coalition achieved the greatest attention for two reasons. First, Robertson hired media-savvy Ralph Reed to run the organization. Reed was a long-time Republican operative with a PhD in history from Emory University, and had carefully considered the failures of the Moral Majority. He did very well on national television, offering soothing reassurances that the Christian Right really did not seek radical policies, but only some balance and "a seat at the table."[17]

Second, the Christian Coalition was focused primarily on elections, which are far easier to report than lobbying efforts to change elements of legislation. The Coalition's specialty was its voter guides, which purported to show the positions of Republican and Democratic candidates in each congressional, Senate, gubernatorial, and presidential races, and in some cases in state legislative races as well. These voter guides were a natural for media attention, and although the coalition mailed long questionnaires to candidates, it was clear that they selected issues and attributed positions to Democratic candidates in an effort to help the GOP win control of government.

The Coalition claimed to have distributed 40 million voter guides in the 1992 election, and also built a voter contact list that they used to increase turnout in competitive states. There was considerable coordination with the Bush-Quayle campaign. The organization claimed to have distributed tens of millions of voter guides in the 1994 and 1996 elections as well, although some former employees dispute this figure. The IRS eventually ruled that the Christian Coalition was primarily an organization that sought to influence elections and revoked its tax exempt status.

Robertson's goal was to help the GOP gain control of Congress by the mid-1990s and the White House by 2000. These targets were

achieved, but the Christian Coalition had collapsed before Bush's narrow Electoral College victory in 2000. Direct mail contributions fell off dramatically after Republicans gained control of Congress in 1994, and Ralph Reed's departure in 1997 under a cloud of allegations left the organization bereft of strong leadership. Before the 2000 campaign had commenced, the Coalition had massive debts and had closed most of its operations.

Like the Moral Majority, the Christian Coalition was founded by Republican activists with a desire to influence elections. The Republican National Senatorial Committee made a large contribution in the first year, and George H. W. Bush held a fundraiser to help boost the coffers of the organization. The organization (along with other Christian Right groups) played a major role in several key congressional races in 1994, helping the GOP win control of the House and Senate for the first time in a generation.

The Christian Coalition was seen by scholars and journalists as more pragmatic and perhaps more mature than the Moral Majority a decade before.[18] Its voter guides sought to portray even moderate Republicans in good light, signaling perhaps an understanding that party control was essential to advancing the group's agenda. Its soothing public face showed sophistication, and its more moderate platform was more palatable to the average American.

Moreover, Reed sought to limit the effects of religious particularism by training his activists to reach out to Catholics, to various Christian theological groups, and even in some instances to orthodox Jews. Instead of pastors to head state and local chapters, he chose retired businessmen who knew the virtues of working with others. The result was an organization that bridged theological divides, and contained fundamentalist, Pentecostal, evangelical, mainline Protestant and even Catholic members.[19]

Yet in hindsight, the Christian Right of the 1990s accomplished little more than the movement a decade before. Once again it helped create a Republican majority that did not deliver the core policies that the movement activists sought, but which amply rewarded neoconservatives, economic conservatives, and others. If the moderate language of the Christian Coalition was intended to gradually win support for its agenda, it had little success. If it was instead simply a plan to help the Republicans win control of government, then it was more successful.

House Republicans adopted for the 1994 elections a "Contract with America," a set of policy promises that would be enacted if they won majority status. The Contract did not include social issues central to the Christian Right platform. The Christian Coalition gamely

helped the Republican leadership to pass elements of the Contract, and Reed announced that he had been promised that after this legislation had been enacted the GOP leadership would turn its attention to his "Contract with the American Family." This new Contract was a pragmatic document that was designed to appear moderate to the average voter. Instead of banning abortions, the Contract called for eliminating "partial birth" abortions and stopping the funding of abortions overseas—the latter a policy that had been already adopted by Reagan and Bush as executive orders.

But despite its more moderate tone, Reed's contract attracted little interest from the GOP leadership, aside from some elements that were long-time GOP priorities. In the 1996 presidential campaign, former Moral Majority activist Cal Thomas bemoaned that, after years of activism in the party, Republican candidate Bob Dole spent more time defending tobacco interests than in talking about abortion.

1999–2008: The Christian Right as Party Faction

The collapse of the Christian Coalition left the Christian Right with two large membership organizations (Focus on the Family and CWA) and a scattering of smaller groups such as the American Family Association and Citizens for Excellence in Education. But none of these organizations were geared primarily to mobilize white fundamentalist and evangelical voters behind Republican candidates. Since the Christian Coalition no longer existed, it was necessary for Republicans to invent it again. In the 2000s, the Republican party and the Bush campaign moved the voter mobilization activities aimed at fundamentalists and evangelicals within the party.

George W. Bush courted fundamentalist, evangelical, and other conservative leaders, frequently discussing his personal religious experiences.[20] During the nomination process the Bush campaign mobilized the remaining Christian Coalition networks and lists, especially in the critical South Carolina primary. Bush's victory in South Carolina assured his nomination, although some of the messages sent through these religious channels so angered McCain that he denounced Falwell and Robertson as "agents of intolerance."[21]

In the general election the Bush campaign sought to build within the campaign the same kind of mobilization machinery that the Christian Coalition had supplied for his father. The campaign asked conservative churches to turn over membership lists so that the campaign could send targeted mailings, a tactic that brought rebuke

from even some of Bush's strongest supporters. The campaign and party committees mailed messages to potential voters that were almost identical to those used by the Christian Right. Indeed one mailer sent by the RNC in West Virginia was almost identical in places to a direct mail solicitation by CWA.

At first, Bush's victory was seen as a great victory for Christian conservatives. Bush's open embrace of evangelical doctrine and his use of coded religious language were seen by many activists as a tremendous change from the personal immorality of the Clinton administration. Bush's religious language allowed him to retain strong support among evangelicals throughout his presidency.[22] But Christian Right leaders became disenchanted with him as they had done with Reagan two decades earlier. Although Bush signed prolife legislation that Congress passed, he did not press them for more. He gave only lukewarm support for a constitutional amendment to ban same-sex marriage, and abandoned the idea soon after the 2004 election. In contrast, his foreign policy was a boon to neoconservatives, and his tax cuts were a major victory for some economic conservatives.

By early 2006, public support for the Bush administration had reached new lows. As the war dragged on and the economy began to falter, Democrats regained control of Congress with a convincing set of victories, and over the next two years Democrats experienced large gains in party registration. By 2008, Bush was so unpopular that Republican strategists tried to keep him away from the presidential campaign. The man who had been celebrated by the Christian Right as a moral, Christian president was primarily associated with dishonest claims that led to war, and with the torture of prisoners.[23]

The 2008 Campaign: The Christian Right in Turmoil

During the 2008 campaign the Christian Right was unable to unite behind a candidate or message. During the nomination phase, national Christian Right leaders endorsed or supported a variety of candidates, including Mitt Romney, Fred Thompson, Mike Huckabee, and Tom Tancredo. The movement was divided for many reasons, one of which was religious particularism. Mitt Romney was an attractive and well funded candidate, but his Mormon faith was seen by many fundamentalists and other evangelicals as outside the Christian tradition. Richard Land, a Southern Baptist lobbyist, proclaimed that Mormons might not be Christians, but they were at least "people of the book"—which put them in the same category as Jews and Muslims. Romney gave

a public speech about his religious views in which he emphasized his family values and claimed that Mormons were Christian, but many fundamentalists were not convinced.

Entrance polls at the Iowa caucuses showed that Huckabee beat Romney primarily because of evangelical hesitation to support a Mormon candidate. Fully 60 percent of Iowa Republican voters called themselves evangelicals, and they split for Huckabee over Romney by 46 percent to 19 percent. More than a third of caucus voters said that the religious beliefs of candidates mattered a great deal to them, and they split for Huckabee 55 percent to 11 percent for Romney.[24]

Although Mike Huckabee was a former Baptist pastor with a lively campaign style and engaging wit, many Christian Right leaders did not endorse him because of his moderate positions on economic issues. As John McCain began to pull ahead, Focus on the Family President James Dobson warned that he could never vote for McCain. McCain's victory forced the movement to confront a difficult choice—to hold true to their principles and sit out the election, or to support McCain and hope to influence his administration.

Christian conservatives threatened to revolt on the GOP convention floor when McCain floated the idea of Joe Lieberman, an Independent Senator from Connecticut who had been Al Gore's running mate in 2000. Few objected to Lieberman's Jewish faith, but his generally prochoice position was seen as a deal breaker. Movement leaders were considerably more enthusiastic when McCain chose instead Alaska governor Sarah Palin, who delivered a powerful speech at the convention, which was interspersed on television with pictures of Palin's young daughter holding her young son who was born with Down's Syndrome. The revelation that Palin's teenaged daughter was pregnant did little to dampen support.

In the end, Dobson did some limited campaigning for McCain, and Focus on the Family published a "Letter from the Year 2012" that warned young evangelicals of the terrible things that had happened since Obama had won the presidency. The letter warned darkly of a country where the Boy Scouts not only had to allow gay scoutmasters, but had to let them sleep in pup tents with the boys. Christian teachers were banished from the classroom, Russia occupied Poland, and Iran had obliterated Israel while Obama sat by. Bookstores no longer carried books by Christian publishers.[25]

Despite these dire warnings, Obama won the endorsement of several prominent moderate evangelicals, and won the votes of a surprising number of young white evangelicals in several key states. Overall, white evangelicals voted for McCain in large numbers, but

Obama carried a number of states where Christian conservatives had in the past proved decisive, including North Carolina, Virginia, Florida, and Colorado.

The Consequences of the Christian Right, 1978–2008

Social movements have the capacity to transform laws, social relationships, and language. The labor movement, the Civil Rights movement, the feminist movement, and the gay and lesbian rights movements have all had a profound impact on the United States. In one generation, the state of Virginia moved from closing its public schools rather than allow blacks to sit in the same classroom as whites to casting their electoral votes for an African American for president. In one generation, a single woman went from being unable to find a job as an attorney because leading firms did not hire women, to sitting on the Supreme Court. Gays and lesbians went in a matter of decades from facing laws that criminalized their sexual relationships to having four states recognizing those relationships with full marriage rights.

The Christian Right, in contrast, has labored for thirty years with few policy victories to show for their efforts. Their efforts to promote traditional women's roles have failed; a majority of even white evangelical mothers who have small children are in the labor force. They have fought a series of losing battles on gay and lesbian rights, on teaching creationism in the classroom, and on many other issues. Only on abortion is law today closer to what the Christian Right wants than it was in 1978, and parental notification and informed consent laws are very far from a ban on all or most abortions that the Christian Right seeks.

Other social movements have succeeded in part by persuading the public of the justice of their cause. The greatest failing of the Christian Right has been to persuade the culture to support its agenda. Indeed, public attitudes on gender equality and especially on gay and lesbian rights have moved more rapidly than nearly any other issues tracked over time by public opinion polls.[26] On abortion there is some evidence that the youngest generation is less prochoice than those who came of age during the 1960s, but they are also far more secular and liberal on other social issues.[27]

Scholars have argued that the increased secularism of the youngest cohort is a reaction to the perceived intolerance of the Christian Right and evangelical churches toward gays and lesbians. If true, this might suggest that the Christian Right's efforts to resist secularization may

have served paradoxically to increase it. In 2010, as the Republican party gained strength, a new social movement called the Tea Party mostly sought to dissociate itself from the social issues that had been the mainstays of the Christian Right.

Back to the Future: The Christian Right in the Next Decade

Predictions about the future of the Christian Right have frequently come back to haunt those who are bold or foolhardy enough to make them. Christian Right mobilization surged and declined several times during the twentieth century, and it is highly unlikely that the movement is now permanently moribund. Evangelical churches are still growing in America, and many congregations have gotten a taste of politics and like it. Polls have consistently shown a constituency for the Christian Right of between 10 percent and 15 percent of the population, a number that is sufficient to support a number of Christian Right organizations.

In the short run, it is likely that Christian Right groups will experience increased contributions and activism among their supporters, as President Obama promotes legislation that they find objectionable. As same-sex marriage is adopted in more states, many fundamentalists will perceive that their moral beliefs are under siege. Just as fundraising fell for Christian Right groups when Reagan and Bush held the White House, they are likely to rise while Democrats are in control.

But in the longer run, the Christian Right may need to adapt to survive. Although evangelical churches are thriving, younger evangelicals are more likely to attend moderate megachurches than small fundamentalist ones. Surveys show that although young evangelicals are even more prolife than their parents, they are more moderate on gay rights, more concerned about world hunger, AIDS and global warming, and more eager to engage the world. The Christian Right has built its organizations by proclaiming a culture war, but many younger evangelicals see the country not as a battlefield, but as a mission field.

Republican donors helped steer resources to Christian Right groups, molding the social movement into one that helped their partisan goals. But the Christian Right never represented all evangelicals, and as younger evangelicals engage in politics with greater confidence, they are likely to raise their voices to compete with the Christian Right. The older generation of Christian Right leaders is mostly retired or dead, and it remains to be seen whether a new generation

will arise who can appeal to younger evangelicals, or whether the movement will undergo another period of quiescence as it did several times in the twentieth century.

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Chapter 2

From Darwin to Dover: An Overview of the Evolution Debate

David Masci

Almost 150 years after Charles Darwin published his groundbreaking theory on the origins of life, Americans are still fighting over evolution. If anything, the controversy is growing in both size and intensity. In the last five years alone, challenges to the teaching of evolution in one form or another have been mounted in school boards, town councils, and legislatures in more than half the states, including Wisconsin, Ohio, Kansas, Pennsylvania, and Washington.

Through much of the twentieth century evolution opponents have either tried to strike the teaching of Darwin's theory from school science curricula or urged schools to also teach the Creation story found in the Old Testament book of Genesis. The famous 1925 *Scopes* "monkey" trial, for instance, involved a Tennessee law prohibiting the teaching of evolution in the state's schools.

But beginning in the 1960s, the Supreme Court issued a number of important decisions that imposed severe restrictions on evolution opponents. As a result, school boards, legislatures, and government bodies are now barred from prohibiting the teaching of evolution. The same holds true for teaching creationism, either along with evolutionary theory or in place of it.

Recently, and partly in response to these court decisions, opposition to evolution has itself evolved, with opponents changing their goals and tactics. In the last decade, some local and state school boards in Kansas, Pennsylvania, and elsewhere have considered

teaching what they contend are scientific alternatives to evolution—notably the concept of intelligent design (ID), which posits that life is too complex to have developed without the intervention of an outside force. Other education officials have tried to require students to hear or read evolution disclaimers, such as one recently proposed in Cobb County, Georgia, that reads, in part, that evolution is "a theory, not a fact [and] . . . should be approached with an open mind, studied carefully and critically considered." Still others, such as officials in Ohio, have attempted to require the teaching of what they consider legitimate scientific criticisms of Darwinian thinking.

Recent polls indicate that challenges to Darwinian evolution have substantial support among the American people. According to an August 2006 survey sponsored by the Pew Forum on Religion & Public Life and the Pew Research Center for the People & the Press, 63 percent believe that humans and other animals have either always existed in their present form or have evolved over time under the guidance of a Supreme Being. Only 26 percent agree with Darwin that life evolved through natural selection.[1]

This view is not shared by the nation's scientists; most of whom contend that evolution is an established scientific theory, not a mere "hunch" or "guess." They dismiss creationism as religion, not science, and usually describe ID as little more than creationism dressed up in scientific jargon. Indeed, while thinkers and politicians have frequently argued over Darwin's place in the classroom and even on the impact of his thinking on broader society, there is almost no disagreement among the vast majority of scientists on the basic precepts of evolutionary theory.

So if, as many scientists claim, evolution is as established as the theory of gravity, why are people still arguing about it more than a century-and-a-half after it was first proposed? The answer lies, in part, in the possible theological implications of evolutionary thinking. For many on both sides of the debate, the Darwinian view of life—as a panorama of brutal struggle and constant change—conflicts with the Judeo-Christian concept of an active and loving Creator. This perceived incompatibility, coupled with the deep and abiding religious faith of many Americans, has ensured the teaching of evolution a prominent place in the country's wider culture war.

The controversy over evolution predates Darwin, having its roots in the debates of late Enlightenment scientists such as Georges Cuvier and Jean Baptiste Lamarck, who argued over whether or not species evolved over time. But only after Darwin settled this debate did the

controversy move beyond the stream of science and into broader religious and social currents.

A Dangerous Idea

At first glance, Darwin seems an unlikely revolutionary. Growing up as a shy and unassuming member of a wealthy British family, he appeared, at least to his father, to be idle and directionless. But while studying botany at Cambridge University, he was offered a chance to be an unpaid naturalist on the *H.M.S. Beagle*, a naval vessel embarking on an exploratory voyage around the world. During nearly five years at sea—surveying the coast of South America and stopping in places like Australia and, most famously, the Galapagos Islands—Darwin had countless opportunities to observe plant and animal life and to collect both living and fossilized specimens for later study.

After the *Beagle* returned to England in October of 1836, he began reflecting on his observations and experiences and over the next two years developed the basic outline of his groundbreaking theory on evolution through natural selection. But beyond a close circle of scientist-friends, Darwin told no one of his views on the origin and development of life. Indeed, he did not publish his now famous volume, *On the Origin of Species*, until 1859, more than 20 years after he had first formulated the theory of natural selection.

Origin may have never been written, let alone published, if it had not been for Alfred Russel Wallace, another British naturalist who independently proposed a strikingly similar theory in 1858. Wallace's discovery prompted Darwin to publicly reveal that his own research had led him to the same conclusion decades before. The following year, Darwin published *Origin*, a lengthy, fleshed-out treatment of his ideas on evolution. The book was an immediate bestseller and it quickly set off a firestorm of controversy.

Darwin had expected no less. Indeed, fear of the backlash from the Britain's religious and even scientific establishment had been one of the reasons he had delayed publicizing his ideas. Furthermore, even though Darwin's name is forever linked with evolution, it was not the concept of evolution or species adaptation and change that was so radical. Scientists had been debating whether animals had evolved for decades before Darwin put forth his theory.

Darwin's achievement was to offer a compelling explanation for how species evolve and to use this explanation to trace the history of life's origins and development. All existing creatures, he argued, share a small number of common ancestors, possibly even one progenitor

species. Darwin compared the history of life to a great tree, with its trunk representing our first ancestors and an extensive system of branches and twigs symbolizing the great variety of life that has evolved from them. This evolution, Darwin wrote, is due to two factors: first, each individual animal is subtly different than its parents—due to what today would be deemed genetic mutation, although Darwin called these differences "variations" owing to the fact that genetics had not become a field of scientific endeavor, and would not until the early twentieth century; second, he argued, although these "variations" are random, some of them inevitably convey distinct advantages—superior camouflage, a heartier constitution, greater speed, etc.—that help a creature to better survive in its environment. Greater chance of survival also means a greater chance to breed and to pass on this advantage to a greater number of offspring. Over time, the advantage spreads throughout the species, again because those with it are more likely to endure ("the survival of the fittest") and reproduce. Over the course of many generations, many of these subtle changes occur and accumulate in a species, eventually producing big changes and even new species.

As already noted, Darwin's ideas challenged both long-held scientific and religious belief systems. But while opposition to much of Darwin's thinking among the scientific communities in the English-speaking world largely collapsed in the decades following the publication of *Origin*, evolution was vigorously rejected by British and American churches because, they argued, it directly contradicts many of the core teachings of the Christian faith.[2]

Darwin's notion that existing species, including man, had developed over time due to constant and random change seemed to be in clear opposition to the idea that all creatures had been created "according to their kind" by God, as is described in the first chapter of the book of Genesis. Darwinian thinking also appeared to contradict the notion, central to Christianity and most other major faiths, that man had a special, God-given place in the natural order. Instead, proponents of evolution pointed to signs in human anatomy—remnants of a tailbone, for instance—showing common ancestry with other mammals. Finally, the idea of a benevolent God who loved His creation was seemingly challenged by Darwin's depiction of the natural world as a savage and cruel place—"red in tooth and claw," as Darwin's contemporary, Alfred Lord Tennyson, famously wrote just a few years before *Origin* was published.

Darwin fully understood, and at times agonized over, the threat that his work might pose to traditional religious belief, explaining in

an 1860 letter to American botanist Asa Gray that he "had no intention to write atheistically." But, he went on, "I cannot see as plainly as others do . . . evidence of design and beneficence on all sides of us. There seems to be too much misery in the world."[3]

Regardless of his intentions, Darwin's ideas provoked a harsh and immediate response from religious leaders in Britain. Henry Cardinal Manning, England's highest ranking Roman Catholic official, denounced Darwin's views as "a brutal philosophy—to wit, there is no God, and the ape is our Adam."[4] Samuel Wilberforce, the Anglican Archbishop of Oxford and one of the most highly respected religious leaders in England, gave a number of talks condemning natural selection, including a now famous speech on its scientific deficiencies at an 1860 meeting of the British Association for the Advancement of Science. At one point, according to some accounts of the meeting, Wilberforce jokingly asked biologist Thomas Henry Huxley, who was present, if he was related to an ape on his grandmother's or grandfather's side. Huxley, whose vigorous defense of evolutionary theory had earned him the nickname "Darwin's Bulldog," allegedly replied that he would rather be the ancestor of a monkey than an advanced and intelligent human being who employs his "knowledge and eloquence in misrepresenting those who are wearing out their lives in the search for truth."[5]

Huxley's jibe at Wilberforce was judged to be a stunning rebuke of religious resistance to Darwinian thinking. And while it did not end the public disagreement over evolution between ecclesiastical and scientific authorities, it made religious thinkers much more wary of directly challenging evolution on scientific grounds. Instead, churches in the late nineteenth and early twentieth century focused much of their energy on resisting the idea that man had evolved from lower animal orders and hence had no special place in creation or, for that matter, a soul. And while some churches, including the Roman Catholic Church, eventually accepted evolution as a God-directed mechanism of biological development, none would give ground on the role of God as the sole creator of man.

American Reactions

Darwinism came to the United States at roughly the same time it burst onto the scientific and cultural scene in Britain. But while members of the scientific community in America, like their colleagues in England, debated the pros and cons of Darwinian evolution, the country's religious establishment largely ignored the issue for more

than a decade, preoccupied with other more-pressing concerns, such as the Civil War, slavery, and reconstruction. There would be no "Wilberforce-Huxley" moment in the United States until the 1920s and the *Scopes* trial.

Still, by the 1870s, some American religious leaders and thinkers began considering the implications of Darwin's theory on Christianity. Not surprisingly, many attacked evolutionary thinking. For example, Presbyterian theologian Charles Hodge, in his book, *What is Darwinism?* (1874), argued that natural selection was unacceptable because it directly contradicted belief in a benevolent and all-powerful God. Others though, such as famed Congregationalist Minister Henry Ward Beecher, tried to create a rapprochement between evolutionary thinking and Christianity, arguing that evolution was simply God's method of creation.

But these early debates over faith and evolution, while important, were largely confined to intellectual circles. The issue did not filter down to the wider American public until the end of the nineteenth century, when a large number of popular Christian authors and speakers, such as famed evangelists Dwight L. Moody and, later, William B. Riley, began to inveigh against Darwinism as a threat to biblical truth and public morality.

The arrival of Darwinian thinking into the American consciousness coincided with the advent of dramatic shifts taking place in the country's religious landscape. From 1890s to the 1930s, the major American Protestant denominations—which, in spite of doctrinal differences, had maintained a unity on basic issues of faith—gradually split into two camps: "modernist" or liberal Christians and "fundamentalist" or conservative Christians.[6] This schism was caused by a number of important developments taking place at the time, including the advent of new scientific thinking (geology and, most notably, evolutionary biology), new questions about the historical accuracy of biblical accounts, and a host of provocative and controversial new ideas about both the individual and society by thinkers such as Sigmund Freud and Karl Marx. Modernists sought to integrate these new theories and ideas into their religious doctrine, while fundamentalists resisted these developments and clung ever more firmly to the older, established doctrine—such as adherence to biblical literalism—that had once been shared by nearly all. Modernism gained ground among urban elites, especially in the Northeast, the industrial Midwest, and the West, while fundamentalism remained strong in heavily rural areas, especially in the South and along the Midwestern farm-belt.

By the early 1920s, evolution had become one of the most, if not *the* most, important wedge issue in this Protestant divide, in part because the debate had taken on a pedagogical dimension. Throughout the nation, students were now studying Darwin's ideas in biology class, resulting in what fundamentalists warned would be dire consequences.

Not surprisingly, the issue became a mainstay for evangelists, including Billy Sunday, the most popular preacher of his day. "I don't believe the old bastard theory of evolution," he said during a 1925 revival meeting in Memphis. "I believe I am just as God Almighty made me." But it was William Jennings Bryan, a man of politics, not the cloth, who ultimately became the leader of a full-fledged crusade against evolution.

Bryan is one of those remarkable figures in American political history who never became president, although he ran for the office three times on the Democratic Party ticket and served as President Woodrow Wilson's first secretary of state. His politics were informed both by Mid-Western populism and Christian fundamentalism, making him a tireless campaigner for the rights of working men and farmers as well as public morality. He reached his political pinnacle in 1896, when he electrified the Democratic National Convention and the nation with his now famous "Cross of Gold" speech, condemning the gold standard as a burden on average working people.

Although Bryan did not have formal religious training, he became a religious leader, especially during the last decade of his life, when his formal political career had ended. He was one of the key figures in the American temperance movement and a tireless campaigner for prohibition, which was finally realized in 1919 with the ratification of the 18th Amendment. In the years that followed, Bryan turned his full attention and formidable public speaking skills to combat the dangers of Darwinism, addressing the issue in countless addresses and articles during the early 1920s.

Bryan and his supporters believed that the presence of Darwin in the nation's classrooms would result in the moral destruction of American youth, arguing that an education in evolution would ensure that a whole generation would grow up believing that the Bible was no more than "a collection of myths" and would undermine the nation's Christian faith. Furthermore, to replace a religion of love and peace with "the survival of the fittest" added insult to injury, he claimed.[7] "The Darwinian theory represents man as reaching his present perfection by the operation of the law of hate—the merciless law by which the strong crowd out and kill off the weak," Bryan

said, going so far as to blame Darwinism for the brutality of the First World War.[8]

Bryan's fear of social Darwinism was not entirely unfounded. Darwin's work had helped to give birth to the eugenics movement, which maintained that one could breed a better person in the same way that farmers bred better sheep and cattle. Indeed, the founder of the eugenics movement, British scientist Francis Galton, was Darwin's first cousin and a great admirer of his work. Eugenics led to the now discredited theories of race and class superiority that helped drive the debate in the United States over immigration and led some American states to enact sterilization laws to stop "mental deficients" from having children. Of course, the movement reached its grisly apex not in North America, but in the concentration camps of Nazi Germany, where millions of Jews, Slavs, Gypsies, and others were exterminated in the name of racial purity.

But most of those who favored the teaching of evolution in public schools were not supporters of the eugenics movement. Many were well-educated Americans who simply wanted students to be exposed to the most up-to-date scientific thinking. For others, like supporters of the newly formed American Civil Liberties Union (ACLU), it was an issue of freedom of speech as well as the maintenance of the separation of church and state. Still others, like famed lawyer Clarence Darrow, saw the battle over evolution as a proxy for a wider cultural conflict between progress and modernity on one side and, what they viewed as the forces of religious superstition and backwardness on the other. Darrow, for one, believed that religion, particularly Christianity, led to unnecessary division within society and was an enemy of social progress. And like Bryan, he was a tireless advocate for his views, writing many books and giving hundreds of speeches and lectures, when he was not engaged in litigating a high profile trial.

In hindsight, it almost seems inevitable that Darrow would clash very publicly with Bryan over evolution, although no one could have predicted the way in which this confrontation would eventually play out. For in a small town in rural Tennessee, these two men would make history, turning a minor criminal prosecution into "the trial of the century."

Scopes and Its Aftermath

As with so many controversies in the United States, the battle over teaching evolution eventually became an issue of law. At the urging of Bryan and other fundamentalist leaders, efforts were made, in the

first years of the 1920s, to ban the teaching of Darwin's theory in a number of states, including Kentucky and Florida. Although these efforts failed, opponents eventually won a victory in 1925 when the Tennessee legislature overwhelmingly approved legislation to making it a crime to teach "any theory that denies the story of the Divine Creation of man as taught in the Bible, and to teach instead that man has descended from a lower order of animal."[9]

Soon after the Tennessee law was enacted, the ACLU offered to defend any science teacher in the state who was willing to break it. John Scopes, who taught physics and math, not biology, in the small rural town of Dayton Tennessee agreed to take up the ACLU's offer. In the 1955 play *Inherit the Wind*, Scopes is sent to prison and is a pariah in his own hometown. In reality, the science teacher did not spend a minute in jail and remained well liked in the community. Furthermore, in the run-up to the trial, the unassuming Scopes went on a nationwide speaking and publicity tour, returning to Dayton a celebrity.

Meanwhile, Bryan and then Darrow agreed to assist the prosecution and defense, respectively—turning an already highly publicized event into a media circus. Indeed, the *Scopes* trial was one of the first true "media events" of the modern era and certainly the first modern media trial. Over two hundred newspaper reporters, some from overseas, attended the proceedings. Moreover, it was broadcast live over the then new and exciting medium of radio and was filmed to be shown in movie theaters across the country.

From the start, both sides understood that the case was being tried in the court of public opinion and both pursued very different strategies in their effort to win over the public. Darrow and the ACLU legal team wanted to put the statute and, by extension, biblical creationism on trial. They attempted, without much success, to argue that the law violated the separation of church and state and that religious revelation was not an appropriate source of educational science standards. But the effort was successfully blocked by the state prosecutors, who effectively argued that the issue before the court was not the law, but Scopes' clear violation of it. Bryan said very little during the actual court proceedings, and instead held regular press conferences outside the courthouse.

As the trial progressed, it seemed increasingly clear that the defense team's hope to make the case into a public debate on the merits of evolution were being stymied by state prosecutors. Just when it seemed that the *Scopes* trial might end with a whimper, Darrow made the highly unorthodox request of calling a member of the

prosecutorial team—Bryan—to the witness stand. The great orator and populist was under no obligation to testify, but he acceded to Darrow's invitation.

With Bryan on the stand, Darrow proceeded to ask a series of detailed questions about biblical events that could be seen as inconsistent, unreal or both. For instance, the lawyer asked, how could there be morning and evening during the first three days of creation, when the sun was not formed until the fourth? And was Jonah really swallowed by a whale? Bryan responded to these and similar questions in different ways. Often, he defended the biblical account in question as the literal truth, the work of a God of miracles. On other occasions, though, he admitted that something might need to be interpreted in order to be fully accepted. For instance, Bryan agreed that the "days" of creation were not actual 24-hour days, implying that the creation of the earth and all life took longer than a week.

Although the largely local crowd observing the two-hour exchange was clearly on Bryan's side, most observers believe that Darrow's cross-examination made the great populist seem inconsistent, flustered, and, at times, even buffoonish. The next day, many big city papers hailed Darrow and savaged Bryan, who died less than a week later, of "heartbreak" as some newspapers maintained.[10] Still, as the University of Georgia's Larson points out, both sides gained something from the exchange. "Due largely to the media's portrayal of Darrow's effective cross-examination of Bryan . . . millions of Americans thereafter ridiculed religious opposition to the theory of evolution," he writes. "Yet the widespread coverage given Bryan's impassioned objections made anti-evolutionism all but an article of faith, among conservative American Christians. When Bryan dies a week later in Dayton, they acquired a martyr to this cause."[11]

Indeed, in the years immediately following the trial, a number of state legislatures debated antievolution laws and two—Mississippi and Arkansas—enacted bills similar to the Tennessee act. Other states, particularly in the South and Midwest, passed resolutions condemning the inclusion of material on evolution in biology textbooks.[12] These actions, along with a patchwork of restrictions from local school boards, prompted most publishers to remove references to Darwin from their science textbooks.

In addition, the ridicule of fundamentalism that followed *Scopes* helped to precipitate the creation and strengthening of a parallel institutional infrastructure to support evangelical Christianity. A host of bible and Christian liberal arts colleges and Christian associations (like Campus Crusade for Christ and the National Association of

Evangelicals) were founded or significantly expanded in the decades following the trial. Christian media also grew greatly during this time, capped by the creation of an extensive network of radio stations.[13] At the same time, the number of Americans joining conservative Christian denominations began to increase, at the expense of more liberal, mainline churches.

Meanwhile, although Scopes was convicted of violating the anti-evolution law and fined, his conviction was later overturned on a technicality by the state supreme court. More significantly for the defense, no one was ever again indicted for teaching evolution in violation of any of the statutes that prohibited it. And efforts to ban evolution from schools in states outside of the South met with failure.

The trial, particularly Darrow's questioning of Bryan, created a tremendous amount of positive publicity for the pro-evolution camp, especially in northern urban areas, where the media and cultural elites were sympathetic. But, as already noted, this post-*Scopes* momentum did not prevent evolution opponents from continuing their campaign to rid Darwinian thinking from schools, let alone allowing it to lead to a nationwide acceptance of evolution. Efforts to make evolution the standard in all biology classes would have to wait a number of decades before bearing any fruit, in large part because the First Amendment's prohibition on religious establishment did not apply to state action until the Supreme Court's 1947 decision in *Everson v. Board of Education*.[14] Efforts to mandate the teaching of evolution also received a boost ten years after *Everson*, in 1957, when the surprise Soviet launch of the first satellite, *Sputnik*, prompted the United States to make science education a national priority.

Epperson and Edwards: The Supreme Court Intervenes

In 1968, more than 20 years after *Everson* applied the Establishment Clause to the states, the Supreme Court finally turned its attention to antievolution laws. The case, *Epperson v. Arkansas*, concerned a challenge to the 1928, post-*Scopes* Arkansas law that made it a crime to teach evolution in a public school or state university. The law did not require the teaching of creationism or any other theory of life's origins, but simply barred Darwinian evolution from the state's public educational system.

In a 9-0 decision, the court ruled that the law violated the First Amendment's Establishment Clause because it ultimately had a religious purpose, in this case preventing students from learning a

particular viewpoint antithetical to fundamentalist Christians. "There can be no doubt that Arkansas has sought to prevent its teachers from discussing the theory of evolution because it is contrary to the belief of some that the Book of Genesis must be the exclusive source of doctrine as to the origin of man," Justice Abe Fortas wrote for the majority.[15] Using state power to advance this end clearly amounted to an establishment of religion and hence was contrary to the First Amendment, Fortas concluded.[16]

Epperson put an end to prohibitions on teaching evolution. But even before the case had been decided, a new antievolution movement, dubbed "creation science" or "scientific creationism," was taking shape and beginning to influence the wider debate. Proponents of creation science contend that the weight of scientific evidence supports the creation story as described in Genesis—with the formation of the earth and the development of life occurring in six, 24-hour days. The presence of fossils and evidence of significant geologic change are attributed to the great catastrophic flood described in the eighth chapter of Genesis, in which all life on the Earth's surface was destroyed, save that of Noah, his family, and the animals they had taken with them in the ark.

Throughout the late nineteenth and early twentieth century, many fundamentalist Christians had come to believe that the Earth was much older than the 6000 or so years biblical scholars had long estimated it to be. As Bryan had testified in the *Scopes* trial, a "day" in the opening chapter of Genesis did not necessarily mean a 24-hour period.

A turn back toward stricter biblical literalism can be traced, in part, to 1961, when engineer Henry M. Morris and theologian John C. Whitcomb published *The Genesis Flood*. The book became the bible of the creation science movement, purporting to present scientific explanations for the creation, destruction, and repopulation of the Earth as described in the book of Genesis.

The Genesis Flood became and remains a bestseller, helping to spawn a network of creation science think tanks, including the Institute for Creation Research, founded by Morris in 1970 and still in existence today. Furthermore, in the wake of *Epperson*, creation science provided an alternative to the now unconstitutional efforts to ban the teaching of evolution. In the early 1980s, two states, Arkansas and Louisiana, embraced creation science, passing so-called balanced treatment statutes that require creation science to be taught alongside evolution.

Both statutes were ultimately the subject of legal challenges. In 1982, the Arkansas law was struck down by a federal district court

in *McClean v. Arkansas Board of Education*. In its analysis of the statute, the district court relied on a 1971 Supreme Court decision, *Lemon v. Kurtzman*, which sets out a three-part test to determine whether a government action violates the Establishment Clause. Under the "*Lemon* test," an action must (1) have a bona fide secular purpose; (2) not advance or inhibit religion; and (3) not excessively entangle the government with religion. If the challenged action fails any one of the three parts of the *Lemon* test, it is deemed to have violated the Establishment Clause.

In *McClean*, Federal District Court Judge William Overton ruled that the Arkansas law violated the Establishment Clause because it did not satisfy any of the *Lemon* test's three prongs.[17] Judge Overton noted that both the author of the act and those who lobbied for it publicly acknowledged its sectarian purpose, which, he said, is otherwise clear from an objective reading of it.[18] Furthermore, Overton determined that creation science was not science, but based wholly on the biblical account of Creation.[19] Therefore, the teaching of creation science clearly advances religion and entangles it with the government.[20]

The Supreme Court entered the creation science debate five years later in *Edwards v. Aguillard* (1987), a case that, like *McClean*, involved a challenge to a "balanced treatment" law, this one from Louisiana. Like the Arkansas statute, the Louisiana act forbade the teaching of the theory of evolution in public schools unless it was accompanied by instruction in the theory of creation science.

In a 7-2 decision, the Supreme Court ruled that the act violated the Establishment Clause because it did not meet the first, or "secular purpose," prong of the *Lemon* test. The court did not bother to consider parts two and three of the test, since failure to satisfy any of the three is sufficient to nullify a government action.

Writing for the majority, Justice William Brennan stated that "the preeminent purpose of the Louisiana legislature was clearly to advance the religious viewpoint that a supernatural being created humankind."[21] He dismissed the state's defense: that the aim of the act was to protect academic freedom and make the teaching of science more comprehensive.[22] Actually, Brennan argued, the Louisiana law severely limited both aims by prohibiting the teaching of evolution unless certain other conditions were met. Furthermore, he maintained, the act's legislative history clearly showed that the statute's primary sponsor in the Louisiana state legislature hoped that passage would lead to the teaching of neither evolution nor creationism.[23] If academic freedom and comprehensiveness were actually the purpose

of the act, Brennan wrote, "it would have encouraged the teaching of all scientific theories about the origins of mankind."

Finally, Brennan left open the door for schools to teach other scientifically based critiques of evolution. "Teaching a variety of scientific theories about the origins of humankind to schoolchildren might be validly done with the clear secular intent of enhancing the effectiveness of science instruction," he wrote.[24]

New Challenges: Disclaimers and Intelligent Design

Neither *Edwards* nor *Epperson* prohibits the teaching of biblical creationism in other contexts, say as part of a literature or world religions class. The Supreme Court has made clear in a number of cases involving the role of religion in schools that "the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion or the like" (*Stone v. Graham*, 1980).

Nevertheless, *Edwards* essentially ended state efforts to bring creationism into public school science classes. As already noted, recent antievolution efforts have focused on other strategies, such as disclaimers and, in the last decade, intelligent design.

Efforts to require either oral or written evolution disclaimers have not met with success in federal courts. In a 1999 decision, *Freiler v. Tangipahoa Parish Board of Education*, the Fifth Circuit Court of Appeals invalidated a disclaimer that teachers read to students in Tangipahoa, Louisiana, before beginning instruction in evolution. The statement in question urged students learning about evolution "to exercise critical thinking and gather all information possible and closely examine each alternative toward forming an opinion." It also stated that teaching evolution was "not intended to influence or dissuade the biblical version of Creation or any other concept."[25]

Writing for a unanimous three-judge panel, Judge Fortunato "Pete" Benavides determined that the disclaimer violated the second or "effect" prong of the *Lemon* test (prohibiting actions that advance or inhibit religion), concluding that "the primary effect of the disclaimer is to protect and maintain a particular religious viewpoint, namely belief in the biblical version of Creation."[26] In particular, Benavides noted that while the disclaimer urged students to think about alternative theories of life's origins, it only referenced "the biblical version of Creation" as a possible alternative.[27]

The most recent disclaimer case, *Selman v. Cobb County School District* (2005), also fell afoul of the *Lemon* test's second prong. Unlike

the oral disclaimer in *Freiler*, the statement approved by Cobb County School Board was to be affixed to textbooks and did not mention the Bible, Creation or even religion. It read: "This textbook contains material on evolution. Evolution is a theory, not a fact, regarding the origin of living things. This material should be approached with an open mind, studied carefully and critically considered."[28]

In *Selman*, Federal District Court Judge Clarence Cooper ruled that while the disclaimer had a legitimate secular purpose (in this case, "fostering critical thinking"[29]) it had the effect of advancing religion, due to the historical context in which most people in the area would view it.[30] Indeed, Cooper wrote, because of longstanding opposition to teaching Darwin's theory by fundamentalist Christians and others in Cobb County, "the Sticker sends a message to those who oppose evolution for religious reasons that they are favored members of the political community, while the Sticker sends a message to those who believe in evolution that they are political outsiders."[31]

The defendants in *Selman* appealed the decision to the 11th Circuit Court of Appeals. But on May 25, 2006, the appeals court ruled that there was insufficient evidence to rule on the constitutionality of the stickers. Instead, the court sent the case back to Judge Cooper, instructing him to re-hear some of the evidence and possibly even retry the case.

Another court challenge has come in response to an effort by the school board in the rural community of Dover, Pennsylvania, to insert intelligent design (ID) into the high school biology curriculum. As already noted, advocates of ID argue that living systems are so complex that they could not have evolved purely by evolution through natural selection and instead must have been directed or designed by an outside force, most likely God. In particular, supporters of ID point to what they say are "irreducibly complex" systems, such as the eye and process by which blood clots, as proof that Darwinian evolution is not adequate to the task of explaining the development of life. "By irreducible complexity I mean a single system that is composed of several interacting parts that contribute to the basic function and where the removal of any one of the parts causes the system to effectively cease functioning," writes Dr. Michael Behe, a professor of biological sciences at Lehigh University and one of the leading scientist-proponents of ID. "An irreducibly complex system cannot be produced directly by slight, successive modifications of a precursor system, since any precursor to an irreducibly complex system is by definition, nonfunctional."[32] In other words, since each part must work in tandem with others to make a certain

system function, it is impossible that these parts could have evolved from simpler precursors because, on their own, they would have had no function. According to Behe and others, these irreducibly complex systems display evidence, not of evolution, but of design.

The great majority of scientists reject ID, claiming that it is little more than creationism dressed up in scientific jargon. Many scientists don't even want to debate ID proponents, arguing that doing so would give the movement a legitimacy it does not deserve. For instance, pro-evolution scientists refused to testify, when, in May 2005, the Kansas Board of Education held hearings on a proposal to insert criticisms of Darwinian evolution into the states' science education standards. However, ID advocates, including Behe, did testify before the Kansas school board.

Still, a small, but highly visible cadre of researchers and thinkers contend that ID will soon become a full-fledged, legitimate scientific theory. The movement is not even two decades old, they point out, having its origins in the writings of Phillip Johnson, a law professor from the University of California at Berkeley, who published his first book on the subject, *Darwin on Trial*, in 1991. Indeed, the nation's premiere ID think tank, the Discovery Institute in Seattle, opposed the Dover school board's efforts to insert even a mention of ID into the high school biology curriculum, arguing that, at this stage, the theory is not developed enough to be taught in high schools.

But in October 2004, the Dover School Board voted to include a brief mention of intelligent design in the curriculum. The resolution required teachers to read a lengthy disclaimer before students began learning about Darwinian evolution. The disclaimer stated, in part, that evolution was a "theory," that "gaps in the theory exist for which there is no evidence," and that "Intelligent Design is an explanation of the origin of life that differs from Darwin's view." A number of area families with children in the public school system then sued the board in federal district court, claiming that the new policy was unconstitutional.

In the case, *Kitzmiller v. Dover Area School District*, the court struck down the new requirement, determining that it was an unconstitutional endorsement of religion. In his lengthy decision, District Court Judge John E. Jones III ruled that ID is not science, but "a religious argument" and "nothing less than the progeny of creationism."[33] Jones noted that the Supreme Court, in *Edwards*, made it unconstitutional for public schools to teach creationism.[34]

More specifically, the judge ruled that because the school board singled out evolution for a disclaimer and introduced a religion-friendly alternative, "an objective student would view the disclaimer as a strong

official endorsement of religion."[35] Moreover, Jones ruled, actions of the school board clearly show that they were motivated by a desire to "advance religion," thus violating the first prong of the *Lemon* test.[36]

Unlike *Selman*, the *Kitzmiller* decision was not appealed. All but one of the school board members who endorsed the curriculum change were voted from office in local elections held a month before the decision, in November 2005. Their replacements do not support teaching ID, and so had no interest in continuing to fight for a policy they fundamentally opposed.

The Battle Continues

Kitzmiller is unlikely to be the final word on the constitutionality of ID or the last high profile case involving evolution. Indeed, during the last ten years, the issue has arisen in nearly every state, from state legislatures to municipal school boards. In Kansas, for instance, the state board of education has rewritten evolution-related language in its science guidelines on four separate occasions since 1999. Most recently, in 2007, a newly elected board voted to remove language questioning evolution and to require students to understand evolution through natural selection.

In addition to Kansas, statewide battles over science standards have occurred in a number of states, including Ohio, Michigan, Texas, and Florida. In Michigan, for instance, members of the state's Board of Education, in 2006, removed language casting doubt on evolutionary theory and voted to require the teaching of evolution through natural selection. Likewise, in 2008, the Florida Board of Education voted to require the teaching of evolution for the first time.

The most recent significant fight has occurred in Texas, where the state board of education has vote to strike prior science standards language requiring students to analyze the "strengths and weaknesses" of scientific theories such as evolution with language more amendable to the scientific community. The standards fight in Texas is particularly important since the state is the second largest purchaser of textbooks in the nation.

While the issue has largely been fought at the state and local level, it has occasionally arisen at the national political level as well. For instance, in 2001, then-Senator Rick Santorum (R-PA) succeeded in adding language to the conference report of the "No Child Left Behind" education law encouraging the teaching of all sides of scientific controversies "such as biological evolution."

And in 2005, then-President George W. Bush dipped his toe in the controversy when he stated that ID should be taught alongside evolution. "Both sides ought to be properly taught . . . so people can understand what the debate is about," he said.[37]

While some scientists and commentators were publicly critical of the president's call to teach "both sides," polls consistently indicate that such a view enjoys significant popular support. For instance, a survey released by the Pew Forum on Religion & Public life in August 2005 (the same month and year the president spoke on the issue) found that 64 percent of Americans support teaching creationism alongside evolution in the classroom.[38]

The issue arose again during the 2008 presidential campaign, when three GOP presidential candidates—Kansas Sen. Sam Brownback, Arkansas Governor Mike Huckabee, and Colorado Congressman Tom Tancredo—indicated that they do not believe in evolution, during a May 3, 2007, GOP presidential candidate debate in Simi Valley California. Like President Bush, the three Republican candidates were heavily criticized for their views by media elites and others. But, as with Bush, the candidates' views were supported by a sizeable slice of the American public. This is particularly true among White Evangelical Christians, a core constituency of the Republican Party. According to an August 2006 Pew Forum poll, only 6 percent of White Evangelicals accept Darwinian evolution.[39]

Evidence that a plurality of Americans still consider themselves to be Creationists or that only a quarter of adults accept evolution through natural selection as the driving force in the development of life is baffling to scientists and others. Indeed, more than 80 years ago, many secular and liberal Christian commentators saw the *Scopes* trial as a turning point in the battle between evolution and "superstition," as Darrow termed conservative Christian belief. By the 1960s, even *Time* magazine, in its famous April, 1966 cover story, pondered whether God was dead—a question that ultimately proved to be premature.[40]

Throughout the twentieth century, religious orthodoxy in the United States has shown itself to be very resilient. And in the last 30 years, conservative Christians have returned from their post-*Scopes* political exile to become one of the most significant forces on the American political landscape, exercising great influence in many of the nation's social, moral, and even foreign policy debates. This influence has helped to place the controversy over teaching evolution squarely on the national agenda, where is likely to remain for some years to come.

Notes

1. See "Many Americans Uneasy with Mix of Religion and Politics," August 24, 2006, at http://pewforum.org/docs/?DocID=153#3.
2. Evolutionary thinking took longer to gain acceptance among scientists on the European continent, especially in predominantly Roman Catholic countries like France and Italy.
3. Quoted in Frederick Burkhardt, ed., *The Correspondence of Charles Darwin*, Vol. 8, (Cambridge University Press, 1993), p. 224.
4. Quoted in Andrew Dickenson White, "The Final Effort of Theology" (1896), reprinted in *Darwin: A Norton Critical Edition*, ed. Philip Appleman (W.W. Norton, 1970), p. 424.
5. Ibid.
6. The two major strands of Protestantism in the United States today—mainline churches, such as Episcopalians and United Methodists, and Evangelicals, such as Southern Baptists and the nondenominational mega-churches—are the direct descendants of the modernists and fundamentalists of the early twentieth century.
7. Edward J. Larson, *Summer for the Gods: The Scopes Trial and America's Continuing Debate Over Science and Religion* (Harvard University Press, 1998), p. 41.
8. Quoted in ibid., p. 39.
9. 1925 Tenn. House Bill 185, cited in ibid, p. 74.
10. Ibid., p. 199.
11. Quoted in Edward J. Larson, *Evolution* (Modern Library, 2004), p. 217.
12. Paul K. Conkin, *When All the Gods Trembled: Darwinism, Scopes, and American Intellectuals* (Rowman & Littlefield, 1998), p. 108.
13. Ibid., p. 107.
14. *Everson v. Board of Education*, 330 U.S. 1, 15 (1947).
15. *Epperson v. Arkansas*, 393 U.S. 97, 107 (1968).
16. Ibid., 109.
17. *McLean v. Arkansas Bd. of Educ.*, 529 F. Supp. 1272 (E.D. Ark. 1982).
18. Ibid., 1264.
19. Ibid., 1267.
20. Ibid., 1272.
21. *Edwards v. Aguillard*, 482 U.S. 591 (1987).
22. Ibid., 588, 589.
23. Ibid., 578.
24. Ibid., 594.
25. *Freiler v. Tangipahoa Parish Bd. of Educ.*, 201 F.3d 346 (5th Cir. 1999).
26. Ibid., 346.
27. Ibid.

28. *Selman v. Cobb County School District*, 390 F. Supp. 2d 1292 (N.D. Ga. 2005).
29. Ibid., 1302.
30. Ibid., 1312.
31. Ibid., 1306.
32. Quoted in Michael J. Behe, "Design in the Details: The Origin of Biomolecular Machines," published in *Darwin, Design, and Public Education*, ed. John Angus Campbell and Stephen C. Meyer (Michigan State, 2003), p. 293.
33. *Kitzmiller v. Dover Area School District*, 400 F. Supp. 2d 721 (M.D. Pa. 2005).
34. Ibid., 712.
35. Ibid., 724.
36. Ibid., 747.
37. Quoted in Peter Baker, and Peter Slevin, "Bush Remarks on 'Intelligent Design' Theory Fuel Debate," *The Washington Post*, August 3, 2005, p. A01.
38. See "Religion a Strength and Weakness for Both Parties; Public Divided on Origins of Life," August 30, 2005, at http://pewforum.org/publications/surveys/religion-politics-05.pdf.
39. See "Many Americans Uneasy with Mix of Religion and Politics," August 24, 2006, at http://pewforum.org/docs/?DocID=153#3.
40. Surveys routinely find that more than 9 in 10 Americans believe in God or a higher power.

Chapter 3

Sex, Sin, and Social Policy: Religion and the Politics of Abstinence-Only Programs

Susan D. Rose

As the only industrialized country to legislate and federally fund abstinence-only-until-marriage programs as social policy, the United States stands out. It also stands out as the only industrialized country still embroiled in a debate over whether creationism should be taught in public schools. These two issues help reveal the dynamic interplay between religion and politics in the United States, and the role and power of conservative religious groups in shaping domestic and foreign policy, especially as it relates to education, reproductive and sexual health, and family issues. While evangelicals represent only 25 percent of the U.S. population, their influence on social policy has been significant. The recent court case in Dover, Pennsylvania (*Tammy Kitzmiller et al. v. Dover Area School District et al.* 2005 WL 578974 [MD Pa. 2005]) over the teaching of evolution and intelligent design and legal actions involving abstinence-only programs reveal the cultural and legal wars being waged over the role of science and religion. Conservative Christians have, in part, achieved their agenda by applying the brakes on research, education, and funding that could reduce the rates of teen pregnancy, birth, and abortion that are higher in the United States than any other industrialized country. This chapter outlines some of the court cases involving sexuality education but focuses primarily on the content, controversies, and consequences of abstinence-only approaches.

ABSTINENCE-ONLY-UNTIL-MARRIAGE

As funding has increased, so has the controversy over abstinence-only programs. Since 1982, when federal support of such programs began, over $1.5 billion dollars have been spent on abstinence-only programs. Initially there was a limited pool of funding through the Adolescent Family Life Act, and then beginning in 1996, funding for abstinence-only grew exponentially with the enactment of welfare reform (P.L. 104–193). Even though it was widely believed that the programs would be cut or eliminated by the newly elected Democratic Congress, they voted on June 7, 2007, to increase funding for the Community-Based Abstinence Education (CBAE) grants by $27.8 million in order to avoid a Presidential veto of their Appropriations Bill. While the $27 million represented just a 10 percent increase in the budget for Title X, it was a 30 percent increase for abstinence-only programs.

For over a quarter of a century, the "family values" movement has been pushing abstinence-only-until marriage programs. In 1981, the U.S. Office of Population Affairs began administering the Adolescent Family Life Act (AFLA), a program designed to prevent teen pregnancy by promoting chastity and self-discipline. In 1983, the American Civil Liberties Union (ACLU) filed suit charging that the AFLA violated the separation of church and state. Challenging the AFLA in court, the ACLU called it "a Trojan horse smuggling the values of the Christian Right—particularly its opposition to abortion—to public-school children at public expense."[1] In 1985 AFLA was found unconstitutional; however, the U.S. Supreme Court reversed the decision on appeal in 1988 and remanded the case to a lower court. In the 5–4 decision in *Bowen v. Kendrick* 487 US 589 (1988), written by Chief Justice Rhenquist, the Court allowed federal funds to be given to religious organizations offering counseling consistent with the AFLA. Finally, an out-of-court settlement in 1993 stipulated that AFLA-funded sex education programs must: (1) not include religious references, (2) be medically accurate, (3) respect the "principle of self-determination" regarding contraceptive referral for teenagers, and (4) not allow grantees to use church sanctuaries for their programs or to give presentations in parochial schools during school hours. Within these limitations, AFLA currently continues to fund abstinence-only programs.[2]

Since the conclusion of the *Bowen v. Kendrick* case, Congress has instituted new abstinence programs. Overshadowed by the welfare-to-work aspects of the 1996 Welfare Reform Act was a provision to fund programs to teach children that sex before marriage is not only

morally wrong but dangerous to their health. This launched the abstinence-only-until-marriage initiative (Section 510 of 1996 Welfare Reform Act); the Special Projects of Regional and National Significance (SPRANS) program followed in 2000. In May 2002, the House of Representatives passed H.R. 473, the Personal Responsibility, Work and Family Protection Bill, which renewed funding of abstinence-only programs at the level of $50 million a year for the next five years.

Since 1996, nearly $1 billion in state and federal funding has been spent on abstinence-only education, despite a lack of evidence supporting the effectiveness of this approach.[3] Under the Bush administration, abstinence-only programs expanded rapidly. While in 1988, only 2 percent of American pupils received abstinence-only rather than comprehensive sex education, today over one-third receive abstinence-only programs.[4]

By law, abstinence-only programs must have as their "exclusive purpose, teaching the social, psychological, and health gains to be realized by abstaining from sexual activity"; and that abstinence from sexual activity is the expected standard unless one is in a monogamous marriage.[5] While this may be a desirable option for young people, it is problematic for many. The median age for initiating sexual intercourse among Americans is 17.4 years, whereas the median age at first marriage is 25.3 years.[6] Despite the declining teen pregnancy rates during the 1990s, 34 percent of teenage girls get pregnant at least once before they reach age 20, resulting in more than 850,000 teen pregnancies a year—the vast majority of which are unintended.[7] At this level, the United States has the highest rate of teen pregnancy in the fully industrialized world: nine times higher than the Netherlands, nearly five times higher than Germany, and nearly four times higher than France. The *teen abortion rate* is nearly eight times higher in the United States than in Germany, nearly seven times higher than in the Netherlands, and nearly three times higher than in France.[8] Much higher rates for HIV, syphilis, gonorrhea, and chlamydia likewise distinguish the United States.[9] Each year, teens in the United States contract an estimated 9.1 million sexually transmitted infections and approximately 50 young people a day, an average of two young people every hour of every day, are infected with HIV.[10] By promoting abstinence-only education that omits complete, medically accurate information, U.S. policy ignores research, public opinion, and the experience of other countries about what actually works to prevent teenage pregnancy and STIs.

The Waxman Report, which examined school-based sex education curricula, concluded that many young people are receiving medically

inaccurate or misleading information in abstinence-only programs, often in direct contradiction to the findings of government scientists.[11] Since 1999, several million children ages 9 to 18 have participated in the more than 100 federal abstinence programs. Congressman Waxman's staff, after reviewing the 13 most commonly used curricula, concluded that two of the curricula were accurate but 11 others, used by 69 organizations in 25 states, contain unproved claims, subjective conclusions or outright falsehoods regarding reproductive health, gender traits, and when life begins.[12] For example, one curriculum said that condoms are only 69 percent effective in preventing HIV transmission. According to the Centers for Disease Control, when used correctly, "latex condoms provide an essentially impermeable barrier to particles the size of STD pathogens."[13]

After years of delay in its release, a federally supported evaluation of abstinence-only-until-marriage programs funded under the 1996 federal welfare reform law has proven the programs ineffective in changing teens' sexual behavior. The report, conducted by Mathematica Policy Research Inc. on behalf of the U.S. Department of Health and Human Services, found no evidence that abstinence-only programs increased rates of sexual abstinence. The 10-year study ordered by Congress found that "youth in the [abstinence-only] program group were no more likely than control group youth to have abstained from sex and, among those who reported having had sex they had similar numbers of sexual partners and had initiated sex at the same mean age."[14] Kirby's 2008 comprehensive review of 56 studies that assessed the impact of both abstinence and comprehensive sex education programs indicated that abstinence programs do not help teens delay initiation of sex and only 3 of the 9 had any significant positive effects on any sexual behavior. In contrast, almost two-thirds of the 47 comprehensive programs showed strong evidence of positive effects on teens' sexual behavior, including delaying first sex and increasing condom and contraceptive use.

Since 1981, when Congress passed the first federal measure to promote abstinence, a number of legal challenges have been brought against government-funded abstinence-only programs. Lawsuits have focused on the use of taxpayer dollars to promote religion, disseminate medically inaccurate information, and perpetuate gender stereotypes.[15] "Many of these challenges have been successful: in some cases, the courts have required abstinence-only programs to remove the offending content; in other cases, school districts have agreed to stop using the curricula in question; and in still other instances, faced with a court challenge, schools have expanded their sexuality education curricula to

include more comprehensive approaches."[16] Nonetheless, abstinence-only advocates have been successful in garnering more money and support for their programs. While *Bowen v. Kendrick* (1988) clarified that public money cannot be used to support religious activities in a publicly funded sexuality education program, it did not stop the federal government from providing funding for abstinence-only programs as they long as they do not promote religion. Challenges can be brought on a case-by-case basis, such as *Coleman v. Caddo Parish School Board*, brought by a group of parents in 1992, that challenged the inclusion of medically inaccurate information in the abstinence-only *Sex Respect* and *Facing Reality* programs.

Teaching Fear

In abstinence-only-until-marriage materials, such as *Sex Respect* and *Facing Reality*, sex is often equated with death, disease, and danger; fear surfaces as the primary message and tactic used to persuade young people to steer clear of sex before or outside of marriage. The abstinence-only video, "No Second Chance," used for middle-school *Sex Respect* audiences,[17] juxtaposes discussions of having sex outside of marriage with images of men dying from AIDS. In "No Second Chance," an evangelical sex educator compares sex outside of marriage—not to the all-American game of baseball—but to playing Russian Roulette. She tells a classroom of young people: "Every time you have sex, it's like pulling the trigger—the only difference is, in Russian Roulette, you only have one in six chances of getting killed." When one boy asks, "What if I have sex before marriage?" he is told, "Well, I guess you'll just have to be prepared to die. And you'll probably take with you your spouse and one or more of your children."

James Dobson's "Focus on the Family" distributes "No Second Chance" and its companion, "Sex, Lies, and the Truth." Both have been widely used in public as well as Christian, schools throughout the United States.[18] Despite challenges to the curriculum, *Sex Respect* is now being used in 50 states and 23 countries.[19]

The manual for *Facing Reality*, the senior high counterpart to *Sex Respect*, lists a number of negative outcomes of premarital sexual behavior:

> Pregnancy, AIDS, guilt, herpes, disappointing parents, chlamydia, inability to concentrate on school, syphilis, embarrassment, abortion, shotgun wedding, gonorrhea, selfishness, pelvic inflammatory disease, heartbreak, infertility, loneliness, cervical cancer, poverty, loss

> of self-esteem, loss of reputation, possessiveness, diminished ability to communicate, isolation, fewer friendships formed, rebellion against other familial standards, alienation, loss of self-mastery, distrust of complementary sex [their term for the other gender], viewing others as sex objects, difficulty with long-term commitments, various other sexually transmitted diseases, aggressions toward women, ectopic pregnancy, sexual violence, loss of a sense of responsibility toward others, loss of honesty, jealousy, depression, death.[20]

Other earlier examples from the 1990s include *Abstinence Works: A Notebook on Pre-Marital Chastity* that invokes the image of Mother Teresa. Displayed on its 1990 cover is the picture of Mother Teresa on one side and a picture of a skeleton on the other. Surrounding them in bold italics are the words:

> Today I set before you Life or Death, Blessing or Curse.
> Oh, that you would Chose Life that you and your children might Live.
>
> (Deuteronomy 30:19)

More currently, founder and President of the National Abstinence Clearing House in Sioux Falls, South Dakota, Leslie Unruh, uses snakes to teach about STDs and the dangers of using condoms. "As she uncoils her nest of rubber vipers: *Herbie Herpes, Wally Wart, Hester Hepatitis, Albert AIDS, Lucy Loss of Reputation*—and don't forget—*poor Pregnant Peggy Sue,* she tells young people about the risks of sex before marriage."[21] "Condoms," she says, "are overrated. 'We tell them condoms won't protect your heart, that latex won't stop human papilloma virus.'"[22]

Leslie Kantor, former director of the SIECUS Community Advocacy Project, conducted an extensive content analysis of Abstinence-Only Sex-Ed Programs produced and promoted by Christian Right groups that are used in public schools. She concluded that "these programs omit the most fundamental information on contraception and disease prevention, perpetuate medical misinformation, and rely on religious doctrine and images of fear and shame in discouraging sexual activity."[23]

Sex, Gender, and Social Control

The political platform of the Religious Right aims to curtail sex education in the schools, and severely limit contraceptive research and dissemination at large, arguing that exposure to information about sex leads to sex. Such concerns about sex and sexuality tend

to focus on issues regarding social order and control—especially over women's bodies and desires. Central to this debate over sexuality education and reproductive health is the Religious Right's attempt to preserve patriarchy.[24] The idea of equality between men and women is threatening to many advocates of abstinence-only policies for they are working not only to prevent sex before or outside of marriage; they are also fighting to preserve the "traditional," patriarchal, nuclear family. The pro-marriage movement goes hand-in-hand with this—as does the promotion of old-fashioned gender role norms.[25]

As one reads through the abstinence-only materials, one finds an old and mixed message —it is the story of sex as a story of predators and prey—and women, beware. Men are considered to be sexual beings who beyond a certain point, cannot hold back—and therefore, women must. Such messages are abundantly clear in Patricia Driscoll's *Sexual Common Sense: Affirming Adolescent Abstinence.* The turning point, according to the Arousal Time Line found in *Sexual Common Sense* is "the prolonged kiss." After this point, there is no turning back. While females too have sexual instincts, they take longer to become aroused and, therefore, are given greater responsibility in exercising constraint.

The following excerpt from *Sex Respect* contextualizes the Arousal Time Line. Presented here is a fictitious dialogue between TV host Jane Bright and psychologist Dr. Wise.[26]

> Jane: We have many teenagers in our "Respecting Sex" audience, Doctor, so I think it would be helpful to them if we talk about how sexual feeling gets stronger as two people become increasingly intimate physically. Let's call it the stages of sexual arousal.
>
> KNOW the Progression of Sexual Feeling
> with increased Physical Intimacy
> Sexual Arousal
>
> Dr. Wise: Fine . . . As you can see, it shows the stages of sexual arousal. Males' thinking about the opposite sex tends to focus on the sexual organs, their own and those of the imagined partner. Females, when they visualize a sex partner—I should say love partner—think not of the male's genitals, but rather of his whole body as an instrument for giving warmth, closeness, and security. In fact, a male can experience sexual release with a woman he doesn't even like, whereas a woman usually can't do so unless she loves her partner.
> Jane: Dr. Wise, do you think this difference is a good thing?
> Dr. Wise: Yes, it helps girls cope with the sexual aggressiveness of boys. It helps them be more level-headed about sex. . . .[27]

Being Together	Hand Holding	Simple Good Night Kiss	Prolonged Kiss	Necking	Petting	Heavy Petting	Mutual Sex Play	Sexual Intercourse	End of Relationship in its Present Form
No genital feeling aroused			beginning of danger	Male Genital feeling aroused	Female Genital feeling aroused	Female Genital feeling aroused			

*Chart from Patricia B. Driscoll, *Sexual Common Sense: Affirming Adolescent Abstinence*. Womanity Publications, 1982.

These distinctions may sound very familiar for they are a part of the "sexual wisdom" of American culture that goes well beyond the confines of conservative Christian thinking. Women are considered to be less controlled by their sexuality and more responsible not only for their own sexual behavior but for the sexual behavior of men. If she is not, then warns evangelist James Robison, whose book *Sex is Not Love* sold over half a million copies, it is one of the worst things that can happen:

> Sex before marriage develops sensual drives that can never be satisfied and may cause a man to behave like an animal. Some girls become that way too, but most of them don't. When they do, it's the most awful thing that can happen to humanity.[28]

Religious Belief and Social Policy

The Religious Right represents perhaps about 10 percent of the adult American population. Their concerns about teenage sex and teen pregnancy clearly resonate with a larger public but their solutions do not. Their influence on social policy has been disproportionate to their numbers for the vast majority of the American public is supportive of sex education. A 2004 report on "Public Support for Comprehensive Sexuality Education" indicates that 93 percent of parents of junior high school students and 91 percent of parents of high school students believe it is very or somewhat important to have sexuality education as part of the school curriculum.[29] And young people? Of the adolescents surveyed, 82 percent of those aged 15–17 and 75 percent of young people aged 18–24 want more information on "how to protect yourself from HIV/AIDS and other STDs," "the different types of birth control that are available," and "how to bring up sexual health issues such as STDs and birth control with a partner."[30]

The electorate likewise shows support for comprehensive sexuality education: 63 percent of voters said they were more likely to vote for a candidate who supports comprehensive sexuality education, while only 10 percent of engaged voters supported abstinence-only-until-marriage programs in public schools.[31] While 30 percent of American adults agree with the statement "the federal government should fund sex education programs that have 'abstaining from sexual activity' as their only purpose," 67 percent of adults agree with the statement that "the money should be used to fund more comprehensive sex education programs that include information on how to obtain and use condoms

and other contraceptives."[32] Although 28 percent of American adults agreed that "providing information about how to obtain and use condoms and other contraception might encourage teens to have sexual intercourse, 65 percent of adults believed that "not providing information about how to obtain and use condoms and other contraception might mean more teens will have unsafe sexual intercourse."[33]

Even conservative Christians tend to support comprehensive sexuality education. A 1999 survey showed that eight in ten conservative Christians supported comprehensive sexuality education in high schools and seven in ten supported it in middle schools.[34] Former President and CEO of SIECUS for 12 years and current president of The Religious Institute on Sexual Morality, Justice, and Healing, Deborah Haffner, agrees, arguing that the majority of evangelicals support comprehensive sexuality education that includes abstinence as an option.[35]

In spite of millions of dollars of funding, to date, there are no sound empirical data that indicate that abstinence-only programs are effective; in fact, there have been very few evaluation studies of Abstinence-Only-Until-Marriage programs done before 2007.[36] Empirical data also suggest that to the degree that an effect of comprehensive sexuality education has been identifiable, it has been found to *postpone* initiation of sexual intercourse; reduce the frequency of intercourse and number of sexual partners; increase the use of contraceptives; and reduce pregnancy rates among teens.[37] Why, then, do abstinence-only approaches appeal to many politicians and policy-makers, even when the majority of Americans support comprehensive sexuality education? What are the consequences of implementing abstinence-only approaches compared with comprehensive sexuality education that includes abstinence as a reasonable and often desirable option? No one is debating whether abstinence should be presented as a viable option and reasonable choice. What critics are questioning is how *abstinence-only- until-marriage* programs came to masquerade as *education* in public schools.

WHOSE RIGHTS? THE SEXUAL POLITICS OF ABSTINENCE-ONLY

The Religious Right is attempting to restore and preserve men's rights over women's rights, and parental rights over children's rights. Gary Bauer, president of the Family Research Council, wrote in his 1995 newsletter a critique of the Fourth World Conference on Women that feminists wanted "to enshrine the 'rights' of adolescents

to information and medical services where sex and AIDS were concerned, without 'interference' from parents" and that although, "parents' rights were not completely overruled, they were subordinated to 'the best interests of the child'." Moreover, he wrote, these radical women were trying "to achieve greater equality between women and men in economic and political spheres, so that women can better support their families and children."

Radical? Yes, writes evangelical psychologist James Dobson who heads up the largest Christian-Right Organization in the United States, Focus on the Family (FOF), with magazines reaching 3 million readers, and a daily radio program reaching over 5 million people on 3,000 stations worldwide. Dobson, author of *Dare to Discipline*, one of the leading child-care manuals sold in the United States, claims that "sex is the hydrogen bomb that permits the destruction of things as they are and [leads to] a simultaneous reconstruction of the new order." In his August 1995 FOF Newsletter, "The Family Under Fire By the UN," James Dobson warned that the UN Conference on Women represents

> the most radical, atheistic, anti-family crusade in the history of the world. . . . The extremists who are . . . promoting this conference are a million miles outside the American mainstream. . . . It is a mystery to me how such enormous threats to our spiritual and cultural heritage have *slithered* [my emphasis] into our midst without due notice or alarm . . .[38]

Former U.S. Presidential candidate and current TV talk commentator, Pat Buchanan, evidently concurred, commenting just after the conference that "it was so bizarre, seeing all those women—it was like the bar scene out of Star Wars" (indeed more than a million miles outside of the American mainstream).

Women's Rights as Human Rights? Reproductive Rights? Children's Rights? Economic Justice for women and their families? Radical ideas? When the world seems incomprehensible or spinning out of control, people will seize upon the oldest and simplest traditions of order—and patriarchy is one of those. According to Karen McCarthy Brown:

> When the mind and the spirit are cut off from the body, women become the magnets for the fear raised by everything else that seems out of control. The degree to which control is exercised over women is therefore a key to the profundity of stresses felt by most persons and groups. Fundamentalism is a product of extreme social stress.[39]

FUNDAMENTALISMS, PATRIARCHY, AND THE HUMAN RIGHTS OF WOMEN

The United Nations' Universal Declaration of Human Rights proclaims that "all human beings are born free and equal in dignity and rights," yet women's freedom, dignity, and equality are persistently compromised by law, custom, and religious tradition in ways that men's are not.[40]

The reinforcement of patriarchy is the trait that Christian fundamentalism most clearly shares with the other forms of religious belief that have also been called "fundamentalist." This characteristic is most evident across the Abrahamic tradition of the three major monotheistic religions: among fundamentalist Israeli Jews, within both Sunni and Shi'ite Moslem communities in various countries, and within the current revival of evangelical Protestantism emanating from the United States. All three seek to control women and the expression of sexuality. Fundamentalists argue that men and women are, by divine design, essentially different, and they aim to preserve the separation between public and private, male and female, spheres of action and influence. As feminists have long pointed out, the gendered nature of this division reveals an inherently political process that both reflects and reinforces power relations. As activist Charlotte Bunch argues:

> The distinction between private and public is a dichotomy largely used to justify female subordination and to exclude human rights abuses in the home from public scrutiny . . . When women are denied democracy and human rights in private, their human rights in the public sphere also suffer, since what occurs in private shapes their ability to participate fully in the public arena.[41]

The most common rationale given for denial of human rights to women is the preservation of family and culture. While Article 16 of the Convention of the Elimination of All Forms of Discrimination Against Women (CEDAW) obligates state parties to take affirmative steps to insure the equality of women and men in marriage and in parental responsibilities,[42] fundamentalists across these three traditions maintain that women are the keepers of the heart and hearth, and men, the keepers of the mind and marketplace. While women are praised for being wives and mothers, their labors are considered, and often rendered, "priceless"—so much so, that a discussion about comparable worth or pay equity falls outside of fundamentalist discourse. Rather than owning property, many fundamentalist women become the property of in order to maintain "family honor".[43] Studies of domestic

violence also indicate that wife and child abuse is more common among families that adhere to "traditional," patriarchal sex role norms.

The pro-family platform of the contemporary Religious Right in the United States unabashedly supports patriarchy, and privileges men's rights over women's rights, and parents' rights over children's and states' rights. As Martin Riesebrodt argues, fundamentalism is primarily a "radical patriarchalism" that represents a protest movement against the increasing egalitarianism between the sexes.[44] This is evident in the kinds of social policies fundamentalist groups have resisted as well as supported. In the early 1980s, North American Protestant fundamentalists lobbied against appropriating funds for shelters for battered women and against mandatory child abuse reporting, arguing that it would "destroy the sanctity and harmony of the home." More recently, conservative groups such as the Christian Coalition, Focus on the Family, the Eagle Forum, and Of the People have campaigned for "parental-rights" legislation at the federal level and in more than 25 states; these various attempts, like the "Parental Rights and Pupil Protection Act," would require parental consent for "a student to be asked any question that might be of embarrassment to him or his family."[45]

In response to these efforts by the Religious Right, a plethora of professional organizations, including medical, government, and religious agencies, have given their support to comprehensive sexuality education and challenged abstinence-only policies on ethical, medical, and civil liberties grounds (see, for example, policy statements by the American Public Health Association, the American Medical Association, the American Academy of Pediatrics). Many groups signed a letter to President Bush stating that they "are committed to responsible sexuality education for young people that includes age-appropriate, medically accurate information about both abstinence and contraception, [and] urge [him] to reconsider increasing funding for unproven abstinence-only-until-marriage programs."[46]

In May 2005, the American Civil Liberties Union (ACLU) and Jenner and Block LLP filed a lawsuit that challenged the federal government's "misuse of taxpayer dollars to fund religious activities in the *Silver Ring Thing* (*SRT),* a nationwide ministry program that uses abstinence-only sex education as a means to bring 'unchurched students to Jesus Christ.'"[47] Filed in the U.S. District Court for the District of Massachusetts, the *ALCU of Massachusetts v. Leavitt*, argued that the *SRT* violated the First Amendment and the principle that taxpayer money cannot be used to promote religion. According to an ACLU memo, within three days, the *SRT* (which had been

awarded more than one million dollars) substantially altered the religious content on its website.[48] Using *Lemon v. Kurtzman*, 403 U.S. 602, 625 1971 and *Bowen v . Kendrick*, 487 U.S. 589, 622–23 (1988) as precedents, the ACLU argued the case on establishment clause grounds, filing the brief against Health and Human Services (HHS). The *SRT* had encouraged teen graduates to sign a covenant "before Almighty God" to remain virgins and wear a ring inscribed with a Biblical passage reminding them to "keep clear of sexual sin." In August 2005, HHS suspended the federal grant to the program, arguing that it misused public money to promote religion. HHS then ordered the group to submit a "corrective action plan" if it hoped to receive an expected $75,000 grant.[49]

In January 2006, a group of physicians wrote in their review article for the *Journal of Adolescent Health* that

> [w]e believe that current federal abstinence-only-until-marriage policy is ethically problematic, as it excludes accurate information about contraception, misinforms by overemphasizing or misstating the risks of contraception, and fails to require the use of scientifically accurate information while promoting approaches of questionable value.[50]

Controversy and legal action involving abstinence-only policies and funding are likely to continue into the foreseeable future. While new bills are being introduced to better support comprehensive sexuality education, abstinence-only programs continue to strongly influence the agenda—both on the domestic scene and in relation to U.S. foreign policy.

International Consequences: From Domestic to Foreign Policy

As we enter the new millennium, family planning, reproductive and sexual health, and economic wellbeing are vital concerns for individuals, communities, and nations. The United States, which is the only country that legislates and funds abstinence-only-until-marriage programs in public schools, also leads the industrialized world in its high rates of teenage pregnancies, abortions, and STDs. While rates of pregnancy, AIDS, and other sexually transmitted diseases remain alarmingly high among America's youth and people in the developing world, opponents of sexuality education and reproductive health are trying to censor vital information and services both at home and abroad.

Recent actions to limit reproductive health reveal the ways in which the United States is retreating from both its own previous position and that of its traditional allies around the world.[51] On his first day in office in January 2001, President Bush reimposed the "global gag rule" that had been instituted by President Reagan in 1984 and revoked by President Clinton in 1993. Imposing the United States' position on abortion practices of other countries, however, reflects neither U.S. law nor U.S. public opinion. It also significantly impedes women's access to family planning and contraceptive services by prohibiting U.S. family planning assistance to hospitals and health clinics in developing countries that also provide abortions or abortion-related information.[52]

At the U.N. Children's Summit in May 2002, U.S. Health Secretary Tommy Thompson argued for the teaching of abstinence as the preferred approach to sex education. According to a CBS World News report, "The three-day conference was long on rhetoric about the sanctity of childhood but short on consensus. Delegates at a U.N. session on children haggled . . . over a final declaration with the United States, the Vatican, and Islamic states in favor of sexual abstinence and against any hint of abortion for adolescents."[53] Susan Cohen, writing for the Guttmacher Institute, reported that "the United States delegation, siding with the Sudan, Iran, and Iraq [and sliding perilously close to Bush's "evil axis"] both stupefied and angered the European (EU) and Latin American delegations which finally voted against the U.S. position." Adrienne Germain, president of the International Women's Health Coalition, bluntly stated:

> This alliance shows the depths of perversity of the [U.S.] position. On the one hand, we're presumably blaming these countries for unspeakable acts of terrorism, and at the same time we are allying ourselves with them in the oppression of women.[54]

In its closing statement at the summit, the EU delivered a strong rejoinder to the United States. "Young people should be empowered to make appropriate and safe choices about their sexual behavior." The Spanish diplomat speaking on the EU's behalf argued: "They [young people] must be able to access high quality sexual and reproductive health information and services to achieve this, as we all agreed in Cairo and Beijing." Belgium's youth minister, Bert Anciaux, went further in a statement released after the summit. The U.S. approach, he said, reduces sex education to "a woolly discourse on abstinence and fidelity" that "does not fit in with the world of experience of millions of young people throughout the world." Echoing the sentiments of others,

Anciaux commented that he was "amazed that, due to the pressure of extremely conservative lobby groups within the United States, the U.S. government has become an ally of all kinds of reactionary regimes."[55]

Likewise, in the seven-day Asian and Pacific Population Conference held in Bangkok in December 2002, the American delegation engaged in an acrimonious debate with all of the other countries over abortion, sex education, and methods of birth control.[56] Assistant Secretary of State Arthur E. Dewey stated unequivocally that the United States would seek to block the passage of any international family planning policy that permits abortion or promotes contraception for adolescents. "The United States supports the sanctity of life from conception to natural death."[57] But when the United States demanded that even the phrase "reproductive health" be struck from the proposal in order to protect unborn children, critics—even those from highly religious countries like the Philippines and Iran—suggested that U.S. foreign policy had been hijacked by the Religious Right. Rejecting proposals by the Bush Administration, 32 Asian nations reaffirmed the historic agreement reached at the 1994 International Conference on Population and Development (ICPD). They also agreed on an action plan to advance reproductive and sexual health and rights across the region.[58]

"It is sad to see the U.S. move from being a leader on these issues, to that of a minority voice," said Ninuk Widyantoro of the Women's Health Foundation in Indonesia. She continued:

> Sexual and reproductive health is one of the most important social issues of the millennium. We know that the U.S. delegation does not even represent the views of the majority of the American people. The current U.S. administration is being held hostage by an extreme conservative minority with little regard for the health, welfare and freedoms of women of Asia and the Pacific. We hope that in the future, U.S. delegations at such conferences will more accurately represent the humanitarian values of the women and men of their nation.[59]

Such positions have distanced the United States from the worldwide consensus on reproductive and sexual health issues that the United States had once been instrumental in shaping at the 1994 International Conference on Population and Development in Cairo, and the 1995 World Conference on Women in Beijing. Throughout the negotiations, it was the "Rio group," comprised of Latin America countries that took the lead in confronting the United States on most of the reproductive health issues, despite the U.S. government's assumption that these overwhelmingly Roman Catholic countries would support the socially conservative U.S. positions. The EU,

Australia, Canada, Japan, and Norway were also active in opposing the U.S. efforts. Cohen concluded: "Indications are that the White House focus primarily is on appeasing its core far-right constituency, which does not bode well for UNFPA."[60]

One-third of the $15 billion dollars that has been earmarked for AIDS prevention and treatment has been reserved for the promotion of abstinence and fidelity. In January 2006, the Bush administration put out a call for new community and church groups to get involved in HIV prevention and care in 15 target countries, most in sub-Saharan Africa. It is reserving $200 million specifically for groups with little or no government grant experience. According to State Department estimates, religious organizations accounted for more than 23 percent of all groups that got HIV/AIDS grants in 2005. Among those winning grants were Samaritan's Purse, which is run by Billy Graham's son, Franklin; World Vision; World Relief, founded by the National Association of Evangelicals ($9.7 million for abstinence work in four countries); Catholic Relief Services (awarded $6.2 million to teach abstinence and fidelity in three countries); $335 million in a consortium providing antiretroviral treatment; and $9 million to help orphans and children affected by HIV/AIDs. The group offers "complete and correct information about condoms" but will not promote, purchase or distribute them, said Carl Stecker, senior program director for HIV/AIDS. On January 29, 2006, U.S. Representatives Barbara Lee (D-Oakland), Henry Waxman (D-CA), Tom Lantos (D-CA), Nita Lowey (D-NY), Betty McCollum (D-MN), and U.S. Senator Dick Durbin (D-IL) sent a letter to Secretary of State Condoleezza Rice today to protest attacks by right wing organizations and Republican members of Congress on effective programs to stop the spread of HIV/AIDS and to call for a funding process based on merit and science, not ideology. Representative Lee wrote: "Our foreign aid programs should not be held hostage to an ideology that opposes the use of sound science. We are fighting a global pandemic, and there is no room in that fight for culture wars or people trying to score political points with their base."[61]

Conclusion

Abstinence-only proponents not only provide medical misinformation and promote fear and ignorance, they also fail to plan, fund, and implement effective social policy that could more effectively curb teen pregnancy and the spread of STDs—and provide better economic, educational, and health opportunities for all young people. Experts

on teen pregnancy and child welfare such as Marianne Wright Edelman and Kristin Luker convincingly argue that teen pregnancy is less about young girls and their sex lives than about restricted horizons and the boundaries of hope.[62] Yet, the Religious Right continues to blame women for stepping out of their place, the feminization of men, the decline of two-parent families, homosexuality, and the media for the ills of our society rather than consider the economic and structural forces that help to perpetuate high teen pregnancy rates and the inequality between men and women. In the battle over sexuality and choice, it is girls' and women's bodies, lives, and livelihoods that are all too often sacrificed.

The threat of women's equality and the usurping of male power is echoed in many Christian Right newsletters, books, sermons, rallies, and TV and radio shows, as the desire for patriarchal control and parental order is unabashedly pronounced. Both hostile and benevolent forms are evident here as the Religious Right attempts to keep women in their place, on the pedestal, dependent on men who are expected to remain in control.[63] The debates around abstinence-only policies, while concerned with trying to prevent adolescent sexual activity, are as much—if not more—about trying to preserve or reclaim the patriarchal, heterosexual Christian family. Planned Parenthood has argued:

> Abstinence-only education is one of the Religious Right's greatest challenges to the nation's sexual health. But it is only one tactic in a broader, longer-term strategy. Since the early 1980s, the "family values" movement has won the collaboration of governments and public institutions, from Congress to local school boards, in abridging students' constitutional rights. Schools now block student access to sexual health information in class, at the school library, and through the public library's Internet portals. They violate students' free speech rights by censoring student publications of articles referring to sexuality. Abstinence-only programs often promote alarmist misinformation about sexual health and force-feed students religious ideology that condemns homosexuality, masturbation, abortion, and contraception. In doing so, they endanger students' sexual health.[64]

The Religious Right has not fully achieved its agenda, but it has produced a chilling effect on comprehensive sexuality education. A 1998 study by researchers at The Alan Guttmacher Institute found that among the seven in ten public school districts that have a district-wide policy to teach sexuality education, the vast majority (86 percent) require that abstinence be promoted, either as the preferred

option for teenagers (51 percent have such an *abstinence-plus* policy) or as the only option outside of marriage (35 percent have such an *abstinence-only* policy). Only 14 percent have a *comprehensive* policy that addresses abstinence as one option in a broader education program to prepare adolescents to become sexually healthy adults. In almost two-thirds of district policies across the nation—those with comprehensive and abstinence-plus policies—discussion about the benefits of contraception is permitted. However, in the one-third of districts with an abstinence-only policy, information about contraception is either prohibited entirely or limited to discussion of its ineffectiveness in protecting against unplanned pregnancy and sexually transmitted diseases.[65]

Cross-national data indicate that American women of all age groups have among the highest unintended pregnancy rates in the industrialized world. These cross-national data also indicate that the countries that have low teen pregnancy rates tend to have more open attitudes towards sexuality and sex education, access to contraceptives and a national health care system, and greater socioeconomic equality. But rather than dealing with the complex problems associated with such high rates of teen pregnancy, including rape and incest, and the fact that the United States also has the highest rates of child poverty, child death, and one of the highest infant mortality rates in the industrialized world, abstinence advocates simply advise young people to "just say no."[66]

The notion of *abstinence only* is more than the description of a U.S. federal program: it reflects deep seated religious and cultural values held in the United States.[67] President Bush substantially cut or eliminated many domestic social programs, while creating or boosting funding for a handful of others that would promote "traditional" family values. A new president is now in the White House. In his very first days in office, Barack Obama signed an executive order lifting the ban on sending U.S. government funds to organizations that provide abortion counseling with money from other sources, thereby reversing the so-called global gag rule; signed the Lily Ledbetter Fair Pay Act; and has supported stem-cell research and greater access to birth control. In emphasizing the importance of scientific research rather than ideology in guiding policy decisions, we may be entering a new era. In the interest of all children, as well as family wellbeing, we need to take seriously a broad-based approach to both social problems and social policy that is based on empirical evidence and a recognition of the pluralistic society in which we live. This is what democracy is all about.

NOTES

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Chapter 4

Uncivil Religion: Judeo-Christianity and the Ten Commandments

Frederick Mark Gedicks and Roger Hendrix

With respect to public acknowledgment of religious belief, it is entirely clear from our Nation's historical practices that the Establishment Clause permits th[e] disregard of polytheists and believers in unconcerned deities, just as it permits the disregard of devout atheists.

—*Justice Antonin Scalia*[1]

I. Introduction: The Permissible Establishment?

In the *Decalogue Cases*,[2] Justice Scalia conceded that government cannot invoke the blessings of "God," or even say his name, "without contradicting the beliefs of some people that there are many gods, or that God or the gods pay no attention to human affairs."[3] Even so, he declares this of no constitutional moment because the historical understanding of the Establishment Clause permits government wholly to ignore those who do not subscribe to monotheism. Noting that more than 97 percent of American believers are either Christians, Jews, or Muslims, Justice Scalia concludes that government invocation or endorsement of belief in a monotheistic God does not violate the Establishment Clause.[4]

Justice Scalia's opinion represents yet another effort to insulate American civil religion from Establishment Clause attack. Coined by Rousseau, the term "civil religion" refers to a set of general religious values, symbols, rituals, and assumptions by which a country interprets its secular history.[5] Civil religion aims to bind citizens to their nation and government with widely shared religious beliefs, thereby supplying a spiritual interpretation of national history that suffuses it with transcendent meaning and purpose.[6]

Since the founding era, successive versions of civil religion have framed loyalty to the United States as a religious commitment as well as a civic one.[7] American civil religion thus filled the role played by the Anglican establishment in England, ascribing theological or spiritual meaning to the events of America's founding and history, and thereby encouraging the social and political cohesion thought necessary for the effective functioning of liberal democratic government.[8]

The most recent incarnation of American civil religion is the "Judeo-Christian tradition," which emerged in the 1950s as a set of broad, even superficial, "spiritual values" that were thought to be held by virtually all Americans.[9] Its originally vacuous content was captured by President Eisenhower's famously awkward observation that American government "makes no sense, unless it is founded in a deeply felt religious faith—and I don't care what it is."[10] As Will Herberg perceptively observed, Judeo-Christianity was less about belief than about believing in belief.[11]

Even the theologically thin tradition of Judeo-Christianity no longer captures the breadth of religious belief among Americans, if it ever did. Dramatic increases in unbelievers, practitioners of non-Western religions, and adherents to postmodern spirituality now leave large numbers of Americans outside the boundaries of Judeo-Christianity, and thus prevent it from performing the politically and socially unifying function of civil religion.[12]

At the same time that religious demographic trends have expanded American religious diversity beyond the boundaries of Judeo-Christianity, political forces are contracting these same boundaries. Many Christian conservatives do not understand Judeo-Christianity as an inclusive manifestation of the religious beliefs of nearly all contemporary Americans, but rather as the historic and theologically exclusive faith of conservative Christianity. Consequently, the symbols and observances of Judeo-Christianity now signify the thicker sectarian meaning of this narrower interpretation of American history, and not the thin religiosity of civil religion. This "sectarianization" of

Judeo-Christianity makes it even less likely to function as a unifying civil religion.

"Sectarianization" also undermines the ethic of religious equality that now informs Establishment Clause jurisprudence. It threatens a regression into classic tolerance, under which government would be constitutionally free to use the symbols and observances of a purportedly inclusive Judeo-Christian civil religion to promote conformity to a sectarian Christianity, so long as it protected the basic rights of unbelievers and adherents to other religious faiths.[13]

The insistence of many Christian conservatives on retaining Judeo-Christianity as the American civil religion creates social and political division, not unity. It is the separation of governmental machinery from thick religious conceptions of the good that has permitted liberal democracy to function in the United States despite radically different conceptions of belief among its citizens. Dramatically increased religious pluralism in the United States, combined with the "sectarianization" of Judeo-Christianity, make it doubly unlikely that Judeo-Christianity or any civil religion can now function as a political and social unifier. Insistence on an American democracy informed by Judeo-Christianity, therefore, is precisely the wrong answer to the question of contemporary religious difference in the United States.[14]

II. Varieties of American Civil Religion

A. The Established Church

In eighteenth-century Britain, the king's dual status as leader of the Church of England and head of the British state was thought essential to the maintenance of loyalty to crown and Parliament among British subjects.[15] A similar understanding also informed American government prior to the Revolution, when the Church of England was officially established in Maryland, North Carolina, South Carolina, Georgia, and Virginia, as well as in portions of metropolitan New York. Five of the original thirteen colonies (and portions of a sixth) established a specific Protestant denomination by law,[16] with the goal of developing and preserving popular loyalty to colonial law and government.[17] Additionally, each city and town in Connecticut, New Hampshire, and Massachusetts was authorized by law to select a locally established religion by majority vote; the overwhelming choice was Congregationalism. Vermont followed the New England model, though it was claimed by other colonies

until the 1790s. Only Pennsylvania, Delaware, New Jersey, Rhode Island, and rural New York lacked an established religion.

B. "Nonsectarian" Christianity

Following the Revolution, the Establishment Clause of the First Amendment forbade the creation of a national church,[18] which the substantial religious diversity of the newly formed American states would have precluded anyway.[19] This same diversity also undermined state religious establishments, the last of which disappeared in the 1830s.[20] In their place arose a "civil religion" that linked American citizenship and loyalty to a "nonsectarian" Christian understanding of the United States as having a divine origin and destiny.[21] The tenets of this civil religion consisted of beliefs purportedly shared by all Christian religions,[22] such as the existence of God, the literal truth of the Bible, the efficacy of prayer, and the expectation of an afterlife in which virtue is rewarded and vice punished.[23] Nonsectarian Christianity enabled the states to countenance close relationships between government and religion while simultaneously rejecting the idea of formal denominational establishments.[24] Public schoolchildren were led in prayer and Bible-reading by government-paid teachers,[25] public prayer became common in the state legislatures,[26] important days of Christian worship were recognized as civic holidays,[27] biblical and other expressions appeared on government seals, documents, and buildings,[28] and anti-blasphemy and Sunday-closing laws reinforced respect for the Christian Sabbath and the Christian God.[29]

C. Judeo-Christianity

Waves of European immigrants in the nineteenth and early twentieth centuries exposed "nonsectarian" Christianity as essentially Protestant.[30] This period is accordingly marked by periodic Catholic and Jewish resistance to assimilation by "nonsectarian" Christian culture,[31] especially in the public schools.[32] By the 1950s, however, these conflicts had largely abated. Succeeding generations of Catholic and Jewish immigrants had absorbed some of the Protestant individualism implicit in "nonsectarianism,"[33] while nonsectarianism itself loosened its ties to Protestant beliefs and observances.[34] This permitted a reformulation of the American civil religion from a "nonsectarian" Christianity to a more plausible transdenominational "Judeo-Christianity."[35] Thus did Justice Douglas declare in the early 1950s that Americans are a "religious" rather than a "Christian" people, and that American institutions

presuppose belief in a "Supreme Being," which presumably signified the Jewish as well as the Christian God.[36]

It was also in the 1950s that Will Herberg published his classic statement of American civil religion, *Protestant–Catholic–Jew*. Herberg argued that unlike other immigrant characteristics like language or national origin, religious identity did not disappear into the "melting pot" of American assimilation.[37] To the contrary, an immigrant entered the mainstream of American life precisely by retaining his or her religious identity—so long as this identity was Protestant, Catholic, or Jewish.[38] "Unless one is either a Protestant, or a Catholic, or a Jew," Herberg argued, "one is a 'nothing'; to be a 'something,' to have a name, one must identify oneself to oneself, and be identified by others, as belonging to one or another of the three great religious communities in which the American people are divided."[39] Noting that virtually all Americans identified themselves with one of these religious groups,[40] Herberg concluded that Protestantism, Catholicism, and Judaism was each a quintessentially American religion, and that "Judeo-Christianity" was thus the American civil religion.[41]

In contrast to the ironic sectarianism of "nonsectarian" Christianity, 1950s Judeo-Christianity had greater potential to perform the socially unifying function of civil religion. As Herberg explained, Judeo-Christianity built and maintained loyalty to the United States by linking certain beliefs and observances shared by Protestants, Catholics, and Jews with patriotic fervor and national obligation. This function of Judeo-Christianity seemed particularly important at the height of the Cold War, in the face of the materialist and atheist threat of Soviet communism. Judeo-Christianity incorporated longstanding traditions, like government-sponsored prayer (especially in public schools) and programs that permitted public school students to receive religious instruction during the normal school hours. To these it added belief in the divine origin and destiny of the United States, recognition of a transcendent morality shared by all Americans, faith in American democracy as the last, best safeguard of individual liberty, and recognition of a monotheistic God who gives America his special care and attention.[42] These values were consistently affirmed in the 1950s, by America's pledging allegiance to a nation "under God," declaring "In God We Trust" as the national motto and imprinting it on American coins and banknotes, erecting monuments and displays of the Ten Commandments, and invoking God and his blessing on the United States in political speeches and at other public events.

Its inclusive potential notwithstanding, Judeo-Christianity did not function for very long as a unifying force in American society.

The relative quiescence of the 1950s was followed by the political and social upheavals of the 1960s and 1970s, which included constitutional invalidation of government use of many Judeo-Christian symbols and observances, particularly in public schools.[43] In reaction, numerous religious activist groups emerged, primarily culturally and politically conservative Christians,[44] whose goals included constitutional justification of the use by government of Judeo-Christian symbols and observances.[45] This coalition of conservative Christians grew and strengthened throughout the 1980s and 1990s, and entered the twenty-first century with considerable social influence and political power.[46]

III. Beyond Judeo-Christianity

Judeo-Christianity is still the American civil religion and continues to inform Establishment Clause doctrine, as the *Decalogue Cases* make clear. Trends in religious demographics, however, suggest that Judeo-Christianity can no longer claim to capture the beliefs of nearly all Americans and, correspondingly, that it can no longer claim to function as a socially and politically unifying civil religion.

A. Unbelief and Eastern Religion

Judging solely from Justice Scalia's rhetoric, one would think that the current number and devotion of American Protestants, Catholics, and Jews is virtually unchanged since the 1950s, save only for the addition of a few Muslims. It is true that adherents to Buddhism, Hinduism, and other non-Western and nonmonotheistic religions still constitute less than 2 percent of all adult Americans.[47] Emphasis on the small absolute number of such adherents, however, ignores their dramatic growth over the last half century.[48] Moreover, Justice Scalia's decision to focus on monotheists as a percentage of the population of *believers* obscures the equally dramatic increase of unbelievers and the unaffiliated in the United States, now between 10 and 15 percent of the population,[49] compared to 3 percent or less during the heyday of Judeo-Christianity.[50]

B. Postmodern Spirituality

Additionally, a postmodern turn toward "spirituality" has arisen among American believers within the last 20 years. This is a new attitude of belief that cannot properly be characterized as either predominantly secular or traditionally religious.[51] Spirituality is characterized by personal choice—by adherence to a faith or religion based

on the individual needs it satisfies, rather than the truth-claims it makes or the conversion experience it may generate.[52] Spirituality incorporates the consumer mentality of a marketplace in which believers shop for beliefs and practices, picking and choosing from among diverse and even incompatible denominations and traditions.[53] Whereas the principal focus of traditional denominational religion is its revelation of a reality beyond the temporal self, the emphasis of spirituality is on revelation of that very self.[54] Between 20 percent and 25 percent of Americans identify themselves as "spiritual, *but not religious.*"[55]

There is undoubtedly some overlap among the categories of unbelief, non-Western religion, and nonmonotheistic religion, on the one hand, and spirituality, on the other, so that one cannot simply add the percentages to calculate a percentage of Americans who find themselves outside of the Judeo-Christian mainstream. The number of adherents to spirituality, for example, almost certainly includes some who would describe themselves as either nonbelievers or followers of eastern religions.[56] Similarly, such adherents also undoubtedly include members of Christian denominations whose spiritual understanding of their faith would not be acceptable to more orthodox members.[57] Nevertheless, the overlap is not total—that is, one cannot assume that all of the "spiritual but not religious" would classify themselves as either unbelievers, followers of a non-Western or nonmonotheistic religion, or members of a Christian denomination.

C. The Barely Believing

Finally, postmodern sensibilities have eroded even traditional denominational understandings of "God" and belief. One effect of the postmodern spirituality movement has been a shift away from denominational Christianity and the truth of its doctrines, even among members of some traditionally conservative denominations.[58] A substantial minority of American believers recall Enlightenment deists, describing their object of faith as a "distant" God who merely "sets the laws of nature in motion," is unconcerned about human activities, and does not intervene in earthly events.[59] Some members of the American Protestant mainline—American Baptists, Congregationalists, Episcopalians, Lutherans, Methodists, and Presbyterians—are skeptical about the divinity of Jesus, oppose literal-historical understandings of the Bible, and reject Jesus's miracles, including the resurrection.[60] Such trends are even evident among evangelical Protestants; large numbers of teenage evangelicals, for example, do not believe in the resurrection and reject

the idea of absolute truth, believing that "all religious faiths teach equally valid truths."[61] These postmodern beliefs seem to be positioned equidistant between traditional Christian belief and agnosticism; at the least, the disconnected and atheological "God" of postmodern believers is not recognizable as the "Heavenly Father" of the Judeo-Christian tradition.

It is not clear if 1950s Judeo-Christianity was ever as broad and inclusive as it claimed to be, particularly with respect to non-Christians like Jews and marginalized Christians like Adventists, Jehovah's Witnesses, and Mormons. The dramatic growth of unbelief and religious pluralism generally has rendered the breadth of Judeo-Christianity even more problematic. One can reliably estimate that between one-quarter and one-third of Americans no longer fall within the orthodox definitions of Protestant, Catholic, or Jew. Even if one adds Islam to Jews and Christians to create a marginally larger "Abrahamic" monotheism,[62] it remains that at least a quarter of Americans adhere to religions or religious beliefs that would place them outside the orthodox boundaries of this reformulation or do not believe in a god at all. Even among the American majority touted by Justice Scalia as "monotheistic believers," traditional faith in a traditional God is often absent. Demographically, then, the United States is now well beyond the point where the symbols and practices of either a "Judeo-Christian" or an "Abrahamic" civil religion can authentically represent the religious commitments of all or nearly all Americans.

IV. THE SECTARIANIZATION OF JUDEO-CHRISTIANITY

Even more problematic for Judeo-Christianity is a cultural counter-revolution of conservative Christians seeking to narrow the meaning of Judeo-Christian symbols and practices, even as increasing numbers of unbelievers and less orthodox believers already find themselves outside the traditionally broad meaning associated with such symbols and practices.

A. The *Decalogue* Cases

During the night of July 31, 2001, Roy Moore, then the Chief Justice of the Alabama Supreme Court, arranged for the installation of a two-and-a-half ton granite representation of the Ten Commandments in a prominent location in the Alabama state courthouse.[63] The installation was filmed by the Coral Ridge Baptist Church, but no

members of the print or electronic media were present (or, apparently, invited).[64] In a dedicatory speech the next day, Chief Justice Moore left no doubt that the monument symbolized the sovereignty of God over the state as well as the church. Referring to quotations from secular historical sources carved on the sides of the monument below the focal representation of the Commandments, Moore declared that the monument displayed

> every ounce of support for the acknowledgment of the sovereignty of . . . God and those absolute standards upon which our laws are based. Oh, this isn't surrounding the plaque with history, historical documents. All history supports the acknowledgment of God. You'll find no documents surrounding the Ten Commandments because they stand alone as an acknowledgment of that God that's contained in our pledge, contained in our motto, and contained in our oath.[65]

Elsewhere in this speech and in his testimony during subsequent litigation, Moore made clear that the "God" to which he referred was the Christian God of the founding fathers and the Judeo-Christian God of American civil religion.[66]

Chief Justice Moore's unapologetically Judeo-Christian defense of his placement of a conspicuous religious monument in the state courthouse triggered more than two years of hard-fought litigation,[67] together with intense media coverage and public demonstrations.[68] The controversy ended in a federal court order to remove the monument from the courthouse as a violation of the Establishment Clause, and the removal of Moore himself from the Alabama Supreme Court for defying that order.

Moore's effort to defend government sponsorship of a sectarian display of the Ten Commandments was not an isolated incident. Lower-court decisions have examined other Decalogue monuments apparently erected with comparable sectarian motivations,[69] and in *McCreary County v. ACLU* the United States Supreme Court reviewed two county courthouse Decalogue displays that had an origin and history similar to those of Moore's Alabama monument.[70] Both involved the hanging of "large, gold-framed copies" of an abridgment of the "King James version of the Commandments," complete with citation to Exodus, in a prominent place in a county courthouse accompanied by explicitly religious or Christian endorsements.[71] In one county, the Commandments appeared after the county council ordered that they be displayed in "'a very high traffic area' of the courthouse."[72] In the

other county, the Commandments were hung in a ceremony at which the county judge endorsed an American astronaut's declaration of the necessary existence of God,[73] and the judge's pastor spoke of the ethical value of the Commandments, noting afterwards that "displaying the Commandments was 'one of the greatest things the judge could have done to close out the millennium.'"[74]

In response to legal challenges, both counties added smaller displays of excerpts from secular documents that referred to God or religious symbols or observances.[75] These additions were ordered by county resolutions that expressly invoked Moore's arguments in defense of his Alabama monument, additionally called Jesus the "Prince of Ethics," and appealed to a purported belief of the founders that government officials were obligated to "'publicly acknowledge God as the source of America's strength and direction.'"[76] These displays were altered yet a third time in the course of litigation, when the other document displays were removed and representations of still other secular documents with religious references were added alongside the Commandments with statements of their historical and legal significance. The Court ultimately declared all the displays unconstitutional under the Establishment Clause for lack of a secular purpose.[77]

Contemporaneous with its review of the Decalogue displays in *McCreary County*, the Court reviewed another such display in *Van Orden v. Perry*. This display is a large stone monument of the King James version of the Commandments located on the grounds of a State Capitol among numerous secular and historical monuments. The monument is one of hundreds that the Fraternal Order of the Eagles donated to state and local governments in the 1950s to encourage juveniles to refrain from antisocial behavior. In a decision that did not yield a majority opinion, the Court rejected an Establishment Clause challenge to the monument on the apparent ground that the context in which the monument appeared suggested secular as well as religious purposes.[78]

B. The Fiction of "Mere Acknowledgement"

The characteristic religious motivation for public Decalogue exhibits contrasts sharply with the manner in which their constitutionality is defended against Establishment Clause challenges. One of the standard rhetorical moves of those who defend government appropriation of Judeo-Christian symbols and practices is deemphasis of their religious content and significance.[79] Supreme Court opinions

defending government deployment of Judeo-Christian symbols and observances consistently characterize them as historical, passive, generic, and innocuous.[80] The *Van Orden* plurality, for example, minimizes the religious significance of the monument at issue in that case, by repeatedly characterizing it as a mere passive "acknowledgment" of the religious history and heritage of the United States.[81] Individual opinions in both *McCreary County* and *Van Orden* follow the same pattern.[82]

The theme of these opinions is that displays of the Commandments constitute only the faintest recognition of a nonsectarian God. Decalogue displays, in other words, purportedly symbolize nothing more than widely shared beliefs. In this view, official government recognition of the Ten Commandments is nothing more than the polite nod one gives to an acquaintance passing on the street. The implication is that objections to such a benign symbolic meaning betray unreasonable hostility to religion.[83]

This rhetoric of "mere acknowledgment" ignores that the symbols and practices of Judeo-Christian civil religion are widely perceived as religious, Christian, and sectarian, and have little to do with contemporary secular law.[84]

1. Religious Meaning

The religious content of the Ten Commandments can hardly be gainsaid.[85] The Commandments prohibit, among other things, unbelief, polytheism, the worship of icons and images, blasphemy, coveting, Sabbath-breaking, parental disrespect, and adultery. These are attitudes and actions that would not—and could not—be criminalized under contemporary constitutional jurisprudence.[86] Only the prohibitions on murder, theft, and perjury have a secular content that is fairly reflected in contemporary law.[87]

2. Christian Meaning

The meaning symbolized by Decalogue displays is not just religious but also Christian. As the context of these displays inevitably makes clear, displaying the Commandments is about honoring the Christian God. It is almost always a Christian majority that seeks to impose Judeo-Christian symbols and observances on the community,[88] even when, as in Decalogue displays, these take the form of a Jewish text or symbol. In fact, the "Judeo-Christian tradition" is far more congenial to the interests of Christians that it is to those of Jews. It is no accident that both Jewish members of the Court voted to invalidate the overtly Christian display in *McCreary*

County that Justice Scalia and other conservative Justices would have upheld,[89] and that one of these Justices also dissented from the Court's validation of the Decalogue display in *Van Orden*.[90] Many Jews are justifiably skeptical that their faith is really included within the theological meaning signified by Judeo-Christian symbols and observances.[91] Because conventional Christian theology generally characterizes Judaism as a proto-Christianity that was "completed" or "fulfilled" with Jesus and the resurrection, Christians can incorporate Judaism into their faith in a way that Jews cannot incorporate Christianity into theirs.[92] To the extent that the "Judeo-Christian" tradition captures essential Christian beliefs, it obviously excludes Jews.

As Christians ourselves, we obviously cannot speak for Jews or other non-Christian minorities. But as Christians, we can express our informed sense that many Christians would find it problematic if "Jehovah" or "Allah" were substituted in place of the ubiquitous and purportedly inclusive "God" of Judeo-Christianity.[93] Whether one pledges allegiance to the United States, for example, as nation under "Jehovah," "Allah," or "God," is not a matter of indifference to American Christians, just as we expect that it is not a matter of indifference to American Jews, Muslims, or adherents to other theistic faiths.[94] The "God" of Judeo-Christianity is not a nondenominational term,[95] any more than the Ten Commandments constitute a nondenominational symbol whose meaning is shared by all or nearly all Americans.[96] Insistence on the inclusive nature of either echoes the insistence of nineteenth-century Protestants that "nonsectarian" Christianity was not essentially Protestant,[97] and the parallel assumption of the 1950s that all Americans fit under the religious umbrella held up by Protestants, Catholics, and Jews.[98]

3. Sectarian Meaning

Finally, the Commandments are not just religious or Christian, but also sectarian. Their symbolic meaning now excludes even many Christians, a purpose betrayed by the consistent choice of the version of the Commandments that appears in the King James Bible instead of the different versions found in the Catholic Douay Bible or one of the more contemporary Protestant translations.[99] For example, the King James's prohibition on the worship of images excludes those who venerate icons, such as Roman Catholics and the Eastern Orthodox.[100] The official government display of the Commandments is also offensive to many American Protestants whose faiths condemn the behaviors denounced by the Commandments, but who also adhere

to the reformist Anabaptist precept that government enforcement or encouragement of religious faith corrupts and cheapens it.[101]

C. Sectarianization and the Return of Classic Tolerance

It is precisely the sectarian Christian significance of "Judeo-Christian" symbols that triggers such strong conservative Christian reactions to their removal from public life.[102] During recent decades, conservative Christians have successfully projected potent theological meaning onto these symbols and practices, meaning that has long since overflowed the bounds of generically thin civil religion.[103] Judeo-Christianity has been, in a word, "sectarianized."

The sectarianization of Judeo-Christianity by conservative Christians makes it difficult even for some monotheistic believers to see their beliefs reflected in its symbols and practices. Conservative Protestant leaders have publicly savaged Islam since 9/11,[104] and comparably vicious attacks on Catholics, Mormons, and theological liberals are well-known.[105] Even Pope Benedict, in an otherwise sensitive call for rational dialogue in religious conflict, implied that Islam is "evil and inhuman" because its Qur'anic command to spread Mohammed's teachings "by the sword" violated God's nature.[106] Thus, while it is true that Catholics, Jews, Mormons, and Muslims are all monotheists who accept the divine origin of the Commandments, the close association of the Commandments with hostile sectarian condemnations of their respective faiths makes it difficult for many adherents to those faiths to see themselves and their beliefs reflected in the symbolic meaning of the Decalogue.

During the years he lived in a small city in the deep South, for example, Professor Gedicks was present for many public prayers offered at community events by conservative Christian ministers and lay believers. The sentiments expressed in these prayers, offered up to "God" or "our Father," in the name of Jesus, were nearly always consistent with his personal religious beliefs. Yet it was also true that clergy of the conservative Christian churches in the community regularly warned their members against the dangerous "cult" of the Mormons, to which Professor Gedicks belongs. Shorn of its context, this prayer language appeared open, benign, and ecumenically inclusive. For a person outside the conservative Christian majority like Professor Gedicks, however, it was impossible to ignore that this language had a sectarian meaning that did not include him.

Perhaps the best example of how conservative Christians have sectarianized the purportedly nondenominational symbols and observances

of Judeo-Christianity is their reaction to former Chief Justice Moore's defiance of a federal court order to remove his ostentatious Decalogue monument from the state courthouse. Broad and deep conservative Christian support for Moore's insistence on maintaining the display even in the face of adverse federal and state judicial decisions "clearly demonstrate[d] the belief of conservative Christian groups that the American legal system depends on God-given law and that the nation must publicly recognize that dependence."[107] In the wake of the Moore controversy and the *Decalogue Cases*, political conservatives in Congress introduced a jurisdiction-stripping measure that would have prevented federal courts from reviewing state court decisions upholding governmental acknowledgments of God, irrespective of whether these are tied to America's religious history or heritage.[108] In introducing this proposed act, one of its cosponsors criticized the separation of church and state and declared that the moral condition of the contemporary United States required the "reintroduction of God" into government and public society.[109]

Many Americans whose religious beliefs would seem to fall comfortably within the boundaries of Judeo-Christian civil religion are alienated from it because of the increasingly close association of its symbols and practices with conservative Christianity.[110] The conservative Christian understanding of the meaning symbolized by Moore's Decalogue monument is based on a narrow and particular interpretation of the Ten Commandments to which Jews, Mormons, Muslims, and even many mainline Protestants cannot authentically subscribe. This, of course, is not even to mention nonbelievers and adherents to non-Western religions and postmodern spirituality.

Conservative Christians have appropriated the symbols and observances of Judeo-Christianity with sufficient success that they no longer communicate theological breadth and inclusiveness, if they ever did. To the contrary, as the result of this sectarianization, Judeo-Christianity now symbolizes a mere toleration of non-Christians, marginalized Christians, mainline Christians, and others outside of the bounds of conservative Christianity—that is, nonbelievers, non-Christians, and heterodox Christians are protected from persecution but not understood to be true equals in the tasks of self-government and in other dimensions of American public life.[111] Since Judeo-Christian symbols and observances now combine sectarian and patriotic meanings, government deployment of such symbols and observances unavoidably communicates that conservative Christianity is properly and exclusively in charge of culture and politics in those governmental communities. The dominant view among many conservative Christians

is that minority religions and nonbelievers should be fully protected from penalties and civil disabilities, with full protection for the free exercise of minority religions. But they also think that religion should be included in all important government functions, that the included religion will be consistent with the majority's beliefs, and that no one could reasonably expect otherwise. Religious dissenters do not have to attend formal worship services, but if they want to attend public meetings, or send their children to public schools, then they simply have to sit through these observances of the majority's religion. In that sense, the majority's religion would be preferred and supported by government, and all other religions would be merely tolerated. Since Judeo-Christian symbols and observances now combine sectarian and patriotic meanings, government deployment of such symbols and observances unavoidably communicates that conservative Christianity is in charge of America.[112]

Sectarianization of Judeo-Christianity has clear doctrinal import. Establishment Clause doctrine is now largely informed by a principal of religious equality and governmental neutrality.[113] These principles generally prevent federal and state governments in the United States from acting as if a particular religion, or even belief generally, were metaphysically true or morally correct.[114] Government use of sectarianized symbols and observances of conservative Judeo-Christianity would undermine and could eventually eliminate these doctrinal ethics of equality and neutrality. In that event, government would be reempowered to define religious truth in accordance with the sectarian preferences of the majority, and religious minorities would have to endure the social marginalization that accompanies adherence to a tradition of belief or unbelief that falls outside the boundaries of the majority's version of Christianity.[115]

The threat of majoritarianism to religious equality and government neutrality is perfectly captured in Justice Scalia's bald declaration that the overwhelming preference of American believers for monotheism justifies both governmental endorsement of monotheism and its corresponding disapproval of polytheism and other nonmonotheistic belief systems. Even setting aside that Justice Scalia has ignored both nonbelievers and nonmonotheistic believers, his argument proves too much. If the fact that 97 percent of American believers are monotheists suffices to immunize government displays of the Commandments from Establishment Clause attack, then the fact that nearly as many American believers are Christians would similarly suffice to insulate government endorsements of Christianity itself, as in, say, government declarations

that "Jesus Christ is our Lord and Savior." One hopes that not even Justice Scalia would go so far.[116]

In sum, at the same time that religious demographics in the United States have placed large numbers of Americans outside the boundaries of Judeo-Christian civil religion, the sectarianization of Judeo-Christianity has shrunk the theological landscape marked by these boundaries, making it doubly unlikely that Judeo-Christianity can function as the social and political unifier that civil religion is supposed to be.

V. Conclusion: The Past That Is No Longer Present

There is an unmistakable nostalgia attached to conservative Christian efforts to reclaim the symbols of Judeo-Christian civil religion. These symbols call American society back to the 1950s, when Judeo-Christianity formed the foundation for the "religious people" of the United States,[117] if not to the 1890s, when "nonsectarian" Protestantism constituted the foundation of a "Christian nation."[118] The sectarianization of Judeo-Christianity exhibits one of the signal attributes of religious fundamentalism: recourse to the past in reaction to uncertainties and upheavals triggered by contemporary life.[119] Fundamentalism looks back to an idyllic time when traditional religious values were thought to have underwritten a social order and stability that economic, political, and cultural liberalization have undermined and surpassed.[120]

But this older order cannot be restored. Liberal democracy seeking to establish or to maintain itself in a social condition of religious pluralism does not flourish when infused with thick religious values.[121] In such conditions, liberal democracy depends on the development of thin, procedural values which permit individuals to pursue their own conceptions of the good, so long as they do not interfere with that pursuit by others.[122] No set of religious values is sufficiently broad, no civil religion sufficiently inclusive, to shelter all or nearly all the citizens of a religiously plural country.[123] To the contrary, linking patriotism and citizenship to civil religion in circumstances of religious pluralism will inevitably result in alienation of those portions of the population who cannot recognize themselves in the America depicted by civil religion.[124]

The linkage of Judeo-Christianity to American politics and government only made sense in a world that has already passed away. Civil religion was supposed to provide a substitute for the established church, a means of morally instructing and spiritually unifying the people so as to bind them to republican government. The irony of

civil religion is that its invocation in contemporary Western society triggers the very disunity it was supposed to remedy. At the very time that religious pluralism has strained the ability of Judeo-Christianity to function as a plausibly national civil religion, conservative Christians have shrunk its inclusive possibilities even further. Even in its most latitudinarian mode, contemporary Judeo-Christianity alienates from their country ever-larger minorities of unbelief, non-Western religion, and postmodern spirituality. At the same time, the efforts of conservative Christians to recall the sectarian meaning of Judeo-Christianity ensure that it will become increasingly exclusive, not inclusive. This is an improbable means of pursuing patriotic loyalty and national unity that ought to be abandoned.

Notes

1. *McCreary County v. ACLU*, 125 S. Ct. 2722, 2753 (2005) (dissenting opinion).
2. *Van Orden v. Perry*, 125 S. Ct. 2854 (2005); *McCreary County v. ACLU*, 125 S. Ct. at 2722. See also *Glassroth v. Moore*, 540 U.S. 1000 (2003) (denying cert. in 335 F.3d 1282 [11th Cir.] [holding that then-Chief Justice Roy Moore's Ten Commandments monument in Alabama state courthouse violated Establishment Clause]).
3. *McCreary County*, 125 S. Ct. at 2752–53 (Scalia J., dissenting).
4. *McCreary County*, 125 S. Ct. at 2753 (Scalia J., dissenting).
5. Robert Bellah, *The Broken Covenant: American Civil Religion in Time of Trial* (New York: Seabury, 1975), 3; see Jean Jacques Rousseau, *The Social Contract* (1762), bk. 4, ch. 8.
6. Yudah Mirsky, "Civil Religion and the Establishment Clause," *Yale Law Journal* 95 (1986): 1237, 1250; Michael Walzer, "Drawing the Line: Religion and Politics," *Utah Law Review* (1999): 619, 621.
7. See Section II.
8. See text accompanying notes 17–19.
9. See text accompanying notes 33–50.
10. Quoted in Will Herberg, *Protestant–Catholic–Jew* (New York: Doubleday, 1955), 97.
11. Ibid., 98; see also Noah Feldman, *Divided by God* 165 (New York: Farrar, Straus & Giroux, 2005).
12. See Section III.
13. See Section IV.
14. See Section V.
15. For example, William Warburton, *The Alliance between Church and State*, 4th ed. (London: A. Miller & J. & R. Tonson, 1766); see Feldman, *Divided by God*, 22; Michael McConnell, "Establishment

and Disestablishment at the Founding—Part I: Establishment of Religion," *William & Mary Law Review* 44 (2003): 2105, 2113.

16. See, for example, Feldman, *Divided by God*, 35; Gordon S. Wood, *The Creation of the American Republic 1776–1787*, 2nd ed. (Chapel Hill: University of North Carolina Press, 1998), 427–28; see also Phillip Hamburger, *Separation of Church and State* (Cambridge, MA: Harvard University Press, 2002), 197 (concluding that even early opponents of establishment in America never intended to create a constitutional doctrine that completely separated government from religion).
17. See McConnell, "Establishment and Disestablishment," 2110–11.
18. U.S. Const. amend I, cl.1 ("Congress shall pass no law respecting an establishment of religion . . . ."); see also art. I, cl.3 ("[N]o religious Test shall ever be required as a Qualification to any Office of public Trust under the United States").
19. George Dargo, "Religious Toleration and its Limits in Early America," *Northern Illinois Law Review* 16 (1996): 341, 352–53; see also Anson Phelps Stokes, *Church and State in the United States* (New York: Harper & Row, 1950), 21–23 (noting the substantial religious diversity in colonial America); Thomas Curry, *The First Freedoms: Church and State to the Passage of the First Amendment* (New York: Oxford University Press, 1986) (documenting the same).
20. See Franklin S. Haiman, *Religious Expression and the American Constitution* (East Lansing: Michigan State University Press, 2003), 6.
21. See Bellah, *The Broken Covenant*, 4, 27, 44.
22. See Feldman, *Divided by God*, 61.
23. Robert Bellah, *Beyond Belief: Essays on Religion in a Post-Traditional World* (New York: Harper & Row, 1970), 171–72; John C. Jeffries, Jr., and James E. Ryan, "A Political History of the Establishment Clause," *Michigan Law Review* 100 (2001): 279, 297–98.
24. See Feldman, *Divided by God*, 63, 81; Hamburger, *Separation of Church and State,* 275–83.
25. See Feldman, *Divided by God*, 81; Jeffries and Ryan, 297–98.
26. See John Witte, Jr., *Religion and the American Constitutional Experiment*, 2nd ed. (Boulder, CO: Westview, 2005), 118; Steven B. Epstein, "Rethinking the Constitutionality of Ceremonial Deism," *Columbia Law Review* 96 (1996): 2083, 2104.
27. See Witte, *Religion and the American Constitutional Experiment,* 118.
28. See ibid., 119; Epstein, "Ceremonial Deism," 2112–13.
29. See Witte, *Religion and the American Constitutional Experiment,* 118; Andrew J. King, "Sunday Laws in the Nineteenth Century," *Albany Law Review* 64 (2000): 675, 684–85.
30. See Feldman, *Divided by God*, 12, 63–64; Hamburger, *Separation of Church and State,* chs. 8 and 10; see also Calvin Massey, "The Political Marketplace of Religion," *Hastings Law Journal* 57 (2005): 1, 11–12; Stephen J. Stein, "Religion/Religions in the United States: Changing Perspectives and Prospects," *Indiana Law Journal* 75 (2000): 37, 44.

31. See, for example, Feldman, *Divided by God*, 77; Thomas C. Berg, "Minority Religions and the Religion Clauses," *Washington University Law Quarterly* 82 (2004): 919, 927.
32. See, for example, Frederick Mark Gedicks, *The Rhetoric of Church and State* (Durham, NC: Duke University Press, 1995), 16; Hamburger, *Separation of Church and State,* 209–221.
33. See Feldman, *Divided by God*, 90–91.
34. See Michael McConnell, "Why is Religious Liberty the 'First Freedom'?" *Cardozo Law Review* 21 (2000): 1243, 1263–64.
35. See Feldman, *Divided by God*, 91; Gerard V. Bradley, "The Enduring Revolution: Law and Theology in the Secular State," *Emory Law Journal* 39 (1990): 217, 218; Barbara L. Kramer, "Reconciling Religious Rights and Responsibilities," *Loyola University of Chicago Law Journal* 30 (1999): 439, 440n10.
36. Compare *Zorach v. Clawson*, 343 U.S. 306, 313–14 (1952) ("We are a religious people whose institutions presuppose a Supreme Being") with *Holy Trinity Church v. U.S.*, 143 U.S. 457, 471 (1892) ("We are a Christian people, and the morality of the country is deeply ingrafted upon Christianity") (quoting *People v. Ruggles*, 8 Johns. 290, 295 [N.Y. 1811]).
37. Herberg, *Protestant–Catholic–Jew,* 40.
38. Ibid., 53–54.
39. Ibid., 53–54.
40. Ibid., 59.
41. See ibid., 101.
42. See, for example, ibid., 52; see also Mirsky, "Civil Religion and the Establishment Clause," 1252.
43. See, e.g., *Stone v. Graham*, 449 U.S. 39 (1980) (holding that public school display of decalogue violated Establishment Clause); *Epperson v. Arkansas*, 393 U.S. 97 (1968) (same with respect to ban on teaching any theory of human origin in public schools); *Abingdon School Dist. v. Schempp*, 374 U.S. 203 (1963) (same with respect to public school-sponsored voluntary prayer and Bible-reading); *Engel v. Vitale*, 370 U.S. 421 (1962) (same with respect to nondenominational government-composed prayer offered at the start of each public school day); *Torcaso v. Watkins*, 367 U.S. 488 (1961) (same with respect to state requirement that notaries affirm belief in God).
44. See, for example, Nancy T. Ammerman, "Deep and Wide: The Real American Evangelicals," *American Interest* 2 (2006): 25, 30; Feldman, *Divided by God*, 192–93; Kenneth L. Karst, *Law's Promise, Law's Expression* (New Haven, CT: Yale University Press, 1993), ch. 1.
45. See Karst, *Law's Promise*, 10, 148.
46. See, for example, Bruce Ledewitz, "Up Against the Wall of Separation: The Question of American Religious Democracy," *William & Mary Bill of Rights Journal* 14 (2005): 555. See generally, Michelle Goldberg, *Kingdom Coming: The Rise of Christian Nationalism*

(New York: W.W. Norton, 2006); Kevin Phillips, *American Theocracy: The Peril and Politics of Radical Religion, Oil, and Borrowed Money in the 21st Century* (New York: Viking, 2006).

47. See, for example, *American Religious Identification Survey*, ed. Barry A. Kosmin, Egon Mayer, and Ariela Keysar (New York: City University of New York Graduate Center, 2001), 13 (Ex. 1), http://www.gc.cuny.edu/faculty/research_studies/aris.pdf; see also *CIA Fact Book*, http://www.cia.gov/cia/publications/factbook/fields/2122.html (reporting that 10 percent of the American population in 2002 reported themselves as affiliated with a religious denomination or sect that was neither Protestant, Roman Catholic, Mormon, Jewish, nor Muslim); Harris Interactive Election 2000 Poll, http://www.adherents.com/rel_USA.html (reporting that 12.7 percent of a random sample of 5.6 million American registered voters identified through the Internet described themselves as affiliated with a religious denomination or sect that was neither Christian nor Jewish).
48. See Leo Rosten, *Religions of America* (New York: Simon & Schuster, 1955), 196–97 (reporting that in 1953, Buddhists numbered only 63,000 or 0.04 percent of a population of about 95 million, and noting that Muslims were present in the United States but no statistical reports of their numbers were available).
49. See, for example, *American Religious Identification Survey*, 13 (Ex. 1) (reporting that 14.1 percent of all adult Americans in 2001 described themselves as being atheist, agnostic, humanist, or secular, or as having no religion at all, and that an additional 5.4 percent refused to specify a religious identification); Glenn H. Utter and James L. True, *Conservative Christians and Political Participation* (Santa Barbara, CA: ABC-CLIO, 2004), 26 (concluded that "the largest percentage gain" reported in survey data between 1965 and 1996 "was in the secular category, which includes those stating no religious preference as well as respondents stating that they are atheists or agnostics," and which increased from 9.7 percent of survey respondents in 1965 to 16.3 percent of respondents in 1996); Harris Interactive Election 2000 Poll, http://www.adherents.com/rel_USA.html (reporting that 7.1 percent of a random sample of 5.6 million American registered voters identified through the Internet described themselves as "agnostic" or "atheist," and that an additional 10 percent described themselves as "nonreligious" or refused to answer); see also Ammerman, "Deep and Wide," 27 (observing that "nearly 20 percent of the [American] population never goes anywhere religious at all"). The study conducted by the Baylor Institute for Studies of Religion suggests that only 4 percent of Americans are nonbelievers. *See American Piety in the 21st Century* (Waco, TX: Baylor Institute for Studies of Religion, September 2006), 8, 12 [hereinafter *Baylor Institute*] (reporting that 10.8 percent of Americans are not affiliated with

a "congregation, denomination, or religious group," but that 62.9 percent of these nevertheless believe in "God or a higher power"), http://www.baylor.edu/content/services/document.php/33304.pdf; see also *Newsweek* (Aug. 29/Sept. 5, 2005), 48 (reporting that only 6 percent of Americans describe themselves as "atheist," "agnostic," or having "no religion," and that only an additional 4 percent declined to answer). It is not clear, however, that the "belief" of this group extends significantly beyond agnosticism. See *Baylor Institute*, 14 (reporting that overwhelming majorities of religiously unaffiliated Americans "never" attend weekly services, pray, or read scripture, and reject the Bible as the word of God); cf. notes 62–65 and accompanying text infra (arguing that the object of faith for many who are routinely classified as monotheistic "believers" is not recognizable as the traditional God of American monotheism).

50. George Gallup, *American Institute of Public Opinion* (January 9, 1948) (reporting that only 3 percent of Americans disclaimed belief in God, and only 3 percent expressed uncertainty about such belief), reprinted in Rosten, *Religions of America*, 247; George Gallup, *American Institute of Public Opinion* (December 9, 1944) (reporting that only 1 percent of Americans identified themselves as not believing in God, and only 5 percent as undecided), reprinted in Rosten, *Religions of America*, 237.
51. See, for example, Stein, "Religion/Religions in the United States," 58.
52. For a detailed discussion of postmodern spirituality, see Frederick Mark Gedicks, "Spirituality, Fundamentalism, Liberty: Religion at the End of Modernity," *DePaul Law Review* 54 (2005): 1197, 1215–19.
53. See, for example, Rebecca French, "Shopping for Religion: The Change in Everyday Religious Practice and Its Importance to the Law," *Buffalo Law Review* 51 (2003): 127; see also Stein, "Religion/Religions in the United States," 57.
54. Gedicks, "Religion at the End of Modernity," 1219; see, for example, Alan Wolfe, *The Transformation of American Religion* (New York: Free Press, 2003), 182–84.
55. See, for example, *Newsweek*, 48 (emphasis added).
56. See Massey, "The Political Marketplace of Religion," 17.
57. See Gedicks, "Religion at the End of Modernity," 1216, 1218.
58. Ibid.; See, for example, Charles Trueheart, "Welcome to the Next Church," *The Atlantic Monthly* (Aug. 1996): 37 (describing the evangelical megachurch movement).
59. *American Piety in the 21st Century*, 27, 29 (reporting that 24.4 percent of Americans believe in such a God).
60. Walter Russell Meade, "God's Country?" *Foreign Affairs* (Sept./Oct. 2006): 30, 31.
61. See Buss, "Houses of Worship: Christian Teens? Not Very," *Wall Street Journal* (Jul. 9, 2004), W13 (reporting findings of evangelical

youth minister Josh McDowell that 91 percent of born-again teenage evangelicals do not believe in absolute truth, that a "slight majority" reject the resurrection, and that nearly 60 percent believe that "all religious faiths teach equally valid truths").

62. See, for example, *McCreary*, 125 S. Ct. at 2753 (arguing that government acknowledgment of the nondenominational monotheistic God of Christianity, Islam, and Judaism does not constitute an establishment of religion) (Scalia, J., dissenting); see also *Van Orden*, 125 S. Ct. at 2861, 2863 (same with respect to government invocation of "God" and the "Judeo-Christian God") (plurality opinion of Rehnquist, C.J.).
63. See *Glassroth v. Moore,* 229 F.Supp.2d 1290, 1294 (M.D.Ala. 2002), *aff'd*, 335 F.3d 1282 (11th Cir.), *cert. denied*, 540 U.S. 1000 (2003).
64. Ibid., at 1294.
65. Ibid., 1321, 1324 (App. C).
66. See ibid., 1300 (summarizing Chief Justice Moore's trial testimony that "the Judeo-Christian God reigned over both the church and the state in [the United States], and that both owed allegiance to that God"); For example, ibid., 1323 (App. C.) (copy of Moore's dedicatory speech) ("Today a cry has gone out across our land for the acknowledgment of that God upon whom this nation and our laws were founded and for those simple truths which our forefathers found to be self-evident; but once again, we find that those cries have fallen upon eyes that have seen not, ears that hear not our prayers, and hearts much like that nether millstone."); see also ibid., 1322–24 (quoting and summarizing references to "God" in or by the preamble to the Alabama Constitution, *McGowan v. Maryland*, 366 U.S. 420 (1961), the Declaration of Independence, the 1954 revision of the Pledge of Allegiance, Samuel Adams, James Madison, William Blackstone, George Washington, the "Star-Spangled Banner," the national motto, executive, judicial, and legislative oaths of office, John Jay, and Thomas Jefferson).
67. See *Glassroth v. Moore*, 229 F.Supp.2d 1290 (M.D.Ala. 2002), *aff'd*, 335 F.2d 1282 (11th Cir.), *cert. denied*, 540 U.S. 1000 (2003); see also 229 F.Supp.2d 1283 (M.D.Ala. 2002) (denying Moore's motion that district judge recuse himself for bias against Moore); 242 F.Supp.2d 1067 (granting motion for permanent injunction and ordering removal of monument after Moore failed to do so voluntarily); 275 F.Supp.2d 1347 (M.D.Ala. 2003) (entering final judgment and permanent injunction against Moore on remand from Court of Appeals); 278 F.Supp.2d 1272 (M.D.Ala. 2003) (denying Moore's motion for stay of final judgment and entrance of injunction pending action on petition for review by Supreme Court); *Glassroth v. Houston*, 299 F.Supp. 1244 (M.D.Ala. 2004) (granting substitution of Senior Associate Justice of Alabama Supreme Court as defendant in Moore's place following Moore's removal as Chief Justice, and denying Moore's motion that such Justice recuse himself from

participation in the litigation); *Moore v. Judicial Inquiry Commission*, 891 So.2d 848 (Ala. Sup. Ct. 2004) (affirming Moore's removal as Alabama Chief Justice for failure to obey federal court orders).

68. See, for example, Jeffrey Gettleman, "Supporters of Ten Commandments Rally On," *New York Times* (Aug. 24, 2003), A20.
69. See, for example, *Adland v. Russ*, 307 F.3d 471 (6th Cir. 2002), *cert. denied*, 538 U.S. 999 (2003); *Turner v. Habersham, County*, 290 F.Supp.2d 1362 (N.D.Ga. 2003); *Mercier v. City of La Crosse*, 276 F.Supp.2d 961 (W.D.Wis. 2003), *rev'd in part & remanded sub nom. Mercier v. Fraternal Order of Eagles*, 395 F.3d 693 (7th Cir. 2005); *ACLU v. v. Rutherford County*, 209 F.Supp.2d 799 (M.D.Tenn. 2002); *ACLU v. Hamilton County*, 202 F.Supp.2d 757 (E.D.Tenn. 2002).
70. *McCreary County v. ACLU*, 125 S. Ct. 2722 (2005).
71. Ibid., 2728.
72. Ibid. (quoting 96 F.Supp.2d 679, 684 [E.D.Ky. 2000]).
73. Ibid.
74. Ibid.
75. Ibid., 2729.
76. Ibid., 2729, 2730–31.
77. Ibid., 2738–39.
78. Ibid., 691–92 (plurality opinion) (arguing that because the state "has treated its Capitol grounds monuments as representing the several strands in the State's political and legal history," the setting "of the Ten Commandments monument in this group has a dual significance, partaking of both religion and government"); ibid., 701–02 (Breyer, J., concurring) (arguing that the placement of the disputed Decalogue monument in a "large park containing 17 monuments and 21 historical markers" illustrates "a relation between ethics and law that the State's citizens, historically speaking, have endorsed," and thus communicates "a . . . secular [moral] message" about proper standards of social conduct").
79. Professor Gedicks elaborated this point in Gedicks, *Rhetoric of Church and State*, 74–80. See also Karst, *Law's Promise*, 154–55; Epstein, "Ceremonial Deism," 2164–65; Alexandra Furth, "Secular Idolatry and Sacred Traditions: A Critique of the Supreme Court's Secularization Analysis," *University of Pennsylvania Law Review* 146 (1998), 579, 591–92; Steven G. Gey, "'Under God,' The Pledge of Allegiance, and Other Constitutional Trivia," *North Carolina Law Review* 81 (2003): 1865, 1905.
80. See, for example, *Allegheny County v. ACLU*, 492 U.S. 573 (1989) (conceding religious significance of Jewish menorah, but arguing that it also signifies a secular cultural tradition akin to Christmas, and that both Christmas and Chanukah are secular symbols of the same "winter-holiday" season); *Lynch v. Donnelly*, 465 U.S. 668 (1984) (characterizing the Christmas nativity scene as commemorating the historical origins of an (unnamed) national holiday, and promoting

friendship and community unity in keeping with the spirit of the (unnamed) season); *McGowan v. Maryland*, 366 U.S. 420 (1961) (characterizing Sunday closing laws as promoting rest, relaxation, recreation, community, and family togetherness, rather than church attendance or Sabbath observance); see also *Elk Grove Independent School District v. Newdow*, 124 S. Ct. 2301, 2317, 2319–20 (2004) (Rehnquist, C. J., concurring in the judgment) (arguing that "under God" in the Pledge of Allegiance is neither an expression nor an endorsement of religious belief, but merely acknowledges that the United States was founded on belief in God); *Santa Fe Indep. School District v. Doe*, 120 S. Ct. 2266, 2286, 2287 (2000) (Rehnquist, C. J., dissenting) (arguing that prayer by a peer-selected student before high school football games solemnized the game, promoted sportsmanship and safety, and created a proper competitive environment, and speculating that students might choose those giving prayers on the basis of public-speaking ability or social standing rather than religion).

81. See, for example, *Van Orden*, 125 S. Ct. at 2862 (plurality opinion) (Monuments and other official government "acknowledgments of the role played by the Ten Commandments in our Nation's heritage are common throughout America"); according to ibid. at 2859:

> Our cases, Janus like, point in two directions in applying the Establishment Clause. One face looks toward the strong role played by religion and religious traditions throughout our Nation's history. The other face looks toward the principle that governmental intervention in religious matters can itself endanger religious freedom. One face looks to the past in acknowledgment of our Nation's heritage, while the other looks to the present in demanding a separation between church and state. Ibid., 2863 ("Our opinions, like our [Supreme Court] building have recognized the role the Decalogue plays in America's heritage.").

82. See *Van Orden*, 125 S. Ct. at 2864 (Scalia, J., concurring) ("[T]here is nothing unconstitutional in a State's favoring religion generally, honoring God through public prayer and acknowledgment, or, in a nonproselytizing manner, venerating the Ten Commandments."); ibid, 2864–65 (Thomas, J., concurring) (The plurality "rightly recognizes the role of religion in this Nation's history and the permissibility of government displays acknowledging that history."); ibid., 2865 (Thomas, J., concurring) ("The mere presence of the monument [on the capitol grounds] involves no coercion and thus does not violate the Establishment Clause."); ibid., 2865 (Thomas, J., concurring) (characterizing the Judeo-Christian symbols reviewed by the Court "benign signs and postings"); *McCreary County*, 125 S. Ct. at 2752 (Scalia, J., dissenting) ("Why, one wonders, is not respect for the Ten Commandments a tolerable acknowledgment of beliefs widely held among the people of this country?"); ibid.,

2753 (Scalia, J., dissenting) ("Historical practices thus demonstrate that there is a distance between the acknowledgment of a single Creator and the establishment of religion."); ibid., 2759 (Scalia, J., dissenting) ("The acknowledgment of the contribution that religion in general, and the Ten Commandments in particular, have made to our Nation's legal and governmental heritage is surely no more of a step towards the establishment of religion than was the practice of legislative prayer. . . .").

83. See, for example, Gey, "'Under God,'" 1914 (discussing *Newdow v. United States Congress*, 292 F.3d 597, 613 (9th Cir. 2002) (Fernandez, J., concurring in part and dissenting in part), *rev'd on other grounds sub. nom. Elkgrove Independent School District v. Newdow*, 124 S. Ct. 2301 [2004]); cf. Timothy Hall, "Sacred Solemnity: Civic Prayer, Civil Communion, and the Establishment Clause," *Iowa Law Review* 79 (1993): 35, 86 ("Justice Scalia implicitly assumes that anyone who cannot endure an innocent civic prayer is simply a bigot.") (discussing *Lee v. Weisman*, 112 S. Ct. 2649, 2678 [1992] [Scalia, J., dissenting]).
84. See Epstein, "Ceremonial Deism," 2165; for example, Arnold Loewy, "Morals Legislation and the Establishment Clause," *Alabama Law Review* 55 (2003): 159, 162–63; Timothy Zick, "Cross Burning, Cockfighting, and Symbolic Meaning: Toward a First Amendment Ethnography," *William & Mary Law Review* 45 (2004): 2261, 2297 (arguing that in the crèche cases the Court was "indifferent" to the "constitutive meaning sacred symbols have for those who truly believe in them") (discussing *Allegheny County. v. ACLU,* 492 U.S. 573 (1989); *Lynch v. Donnelly*, 465 U.S. 668 [1984]).
85. See Epstein, "Ceremonial Deism," 2165 ("[U]nder any honest appraisal of modern American society, the practices constituting ceremonial deism have *not* lost their religious significance."); *cf.* Zick, "Cross Burning," 2297 (arguing that in the crèche cases the Court was "indifferent" to the "constitutive meaning sacred symbols have for those who truly believe in them").
86. See *Stone v. Graham,* 449 U.S. 39, 42 (1981) (observing that Decalogue prohibitions on polytheism, idolatry, blasphemy, and Sabbath-breaking specify "religious duties of believers"); Lowey, "Morals Legislation and the Establishment Clause," 159, 162–66 (arguing that government enforcement of Decalogue prohibitions on disbelief in the monotheistic God, making graven images of God, blasphemy, and coveting would clearly violate the Establishment Clause, and that such enforcement of Decalogue prohibitions on Sabbath breaking, parental disrespect, and adultery would avoid violating the Clause only in particular circumstances).
87. See Loewy, "Morals Legislation and the Establishment Clause," 162; see also *Stone*, 449 U.S. at 41–42 (observing that only the prohibitions on honoring one's parents, murder, adultery, theft, perjury, and coveting are "arguably secular").

88. See, for example, *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000) (school sponsored prayers delivered by evangelical Protestant students at high school football games); *County of Allegheny v. ACLU*, 492 U.S. 581 (1989) (government sponsored Christmas nativity scene); *Lynch v. Donnelly,* 465 U.S. 668 (1984); *Braunfeld v. Brown*, 366 U.S. 599 (1961) (Sunday closing law); see also Furth, "Secular Idolatry and Sacred Traditions," 604 (observing that symbols of civil religion whose use by government is defended because of their purportedly "secularized" character are usually Christian). But see *Lee v. Weisman*, 505 U.S. 577 (1992) (government sponsored prayer delivered by Jewish rabbi at junior high school graduation).
89. See *McCreary County*, 125 S. Ct. at 2727 (noting that Ginsburg and Breyer, JJ., joined the majority opinion of Souter, J.); cf. Karst, *Law's Promise,* 157 (noting that the authors of the two main dissents to a Ninth Circuit opinion upholding state recognition of Good Friday as an official holiday were, respectively, Baha'i and Jewish).
90. *Van Orden*, 125 S. Ct. at 2873, 2892 (noting that Ginsburg, J., joined the dissenting opinions of Stevens & Souter, JJ., respectively).
91. See notes 88–89 and accompanying text.
92. See, for example, *Allegheny*, 492 U.S. 581 (1989) (government sponsored display of Christmas tree with Jewish menorah); *Edwards v. Aguillard*, 482 U.S. 578 (1987) (state law mandating the teaching of creationism together with Darwinism in public schools to balance that latter's challenge to literal readings of Genesis creation story); *Epperson v. Arkansas*, 393 U.S. 97 (1968) (state law prohibiting the teaching of Darwinism in public schools because of challenge to literal readings of Genesis creation story).
93. See 545 U.S. 844, 848 (noting that Ginsburg and Breyer, JJ., joined the majority opinion of Souter, J.); compare Karst, *Law's Promise,* 157 (noting that the authors of the two main dissents to a Ninth Circuit opinion upholding state recognition of Good Friday as an official holiday were, respectively, Baha'i and Jewish).
94. See 545 U.S. 677, 707, 737 (noting that Ginsburg, J., joined the dissenting opinions of Stevens and Souter, JJ., respectively).
95. See, for example, Arthur A. Cohen, *The Myth of the Judeo-Christian Tradition* (New York: Schocken, 1970), 55–56, 69–70; see also Joan Delfattore, *The Fourth R: Conflicts over Religion in America's Public Schools*, (New Haven, CT: Yale University Press, 2004), 312 ("Islam has an analogous attitude towards Christianity, which makes it unlikely that any sort of 'Abrahamic' tradition drawn from Judaism, Christianity, and Islam could effectively succeed Judeo-Christianity as a unifying American civil religion.").
96. See Suzanna Sherry, "Religion and the Public Square: Making Democracy Safe for Religious Minorities," *DePaul Law Review*

47 (1998): 499, 504–6 (similarly observing that "the common appeal to a purportedly Judeo-Christian tradition" ignores "that Jews are not Christians"); Mark Silk, "Notes on the Judeo-Christian Tradition in America," *American Quarterly* 36 (Spring 1984): 65, 78–79 (detailing numerous ways in which Christianity theologically contradicts Judaism); Mark V. Tushnet, "The Conception of Tradition in Constitutional Historiography," *William & Mary Law Review* 29 (1987): 93, 94n6 ("I had thought that the Judeo-Christian tradition was actually a Christian tradition; that is, only Christians can describe a Judeo-Christian tradition because they orient themselves to a set of ideas that includes elements that comprise the essence of Judaism. Conversely, Jews do not orient themselves to a set of ideas that includes elements that comprise the essence of Christianity").

97. Cf. Epstein, "Ceremonial Deism," 2084–86 (imagining a predominantly Muslim United States pervaded by official references and appeals to "Allah," in which most Christians and Jews would feel like outsiders); George Cardinal Pell, "Islam and Us," *First Things* (June/July 2006): 33, 34 (observing that Christians and Muslims both dispute that Jews, Christians, and Muslims worship the same God.)
98. A powerful example that Judeo-Christianity does not function as an inclusive monotheistic civil religion was provided by the widespread outrage expressed by many religious conservatives, including Rep. Virgil Goode (R-Va.), at the prospect that Keith Ellison (D-Minn.), a Muslim newly elected to Congress, would take his oath of office on the Qur'an rather than the Bible. See Amy Argetsinger and Roxanne Roberts, "But It's Thomas Jefferson's Koran!," *Washington Post* (Jan. 3, 2007); Andrea Stone, "Newly Elected Muslim Lawmaker under Fire" (reporting view of conservative radio talk show host Dennis Prager—who is, apparently and ironically, Jewish—that Ellison should not be permitted to take the oath on the Qor'an "because the act undermines American culture," and that a representative who is unable to take the oath of office on a "Christian Bible" should not serve in Congress). See also Karst, *Law's Promise,* 158 (relating strong and widespread negative public reaction to invocation by Buddhist priest at state university graduation ceremony in the early 1990s).
99. See, for example, Feldman, *Divided by God*, 230 (observing that Muslims consider the Bible "a preliminary, imperfect revelation, unlike God's definitive teaching, found only in the Qur'an"); Steven H. Shiffrin, "The Pluralistic Foundations of the Religion Clauses," *Cornell Law Review* 90 (2004): 9, 70 (suggesting that Buddhists, along with atheists and agnostics, resent having to send their children to public schools that recite a pledge to a nation "under God").

100. See, for example, Douglas Laycock, "Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes, but Missing the Liberty," *Harvard Law Review* 118 (2004): 155, 226 (arguing that the Pledge is a profession of faith that implies a set of particular religious beliefs, including that God exists, that there is only one God, and that this God exercises controlling authority over the United States); ibid., 226–27n458 (noting others who believe that the Pledge implies that the United States is under God's judgment, that government is limited by God, and that God is transcendent).
101. See Paul Finkelman, "The Ten Commandments on the Courthouse Lawn and Elsewhere," *Fordham Law Review* 73 (2005): 1477, 1498. ("For an increasing number of Americans, the Ten Commandments have no religious significance. [W]hile the Ten Commandments speak directly to Jews, and indirectly to Christians, they have no relevance to the religious life of people who are not of these faiths.")
102. See Chemerinsky, "Why Justice Breyer Was Wrong in *Van Orden v. Perry*," 7; Shiffrin, "The Pluralistic Foundations of the Religion Clauses," 70; Zick, "Cross Burning," 2371–72.
103. See Massey, "The Political Marketplace of Religion," 37–38.
104. See Esther Kaplan, *With God on Their Side: George Bush and the Christian Right* (New York: New Press, 2005), 82; Utter and True, *Conservative Christians,* 29.
105. See, for example, Kaplan, *With God on Their Side,* 74; Utter and True, *Conservative Christians,* 68, 71.
106. Pope Benedict XVI, "Lecture of the Holy Father," Aula Magna, University of Regensburg, Germany (Sept. 12, 2006) (quoting a thirteenth-century Byzantine emperor), http://www.cwnews.com/news/viewstory.cfm?recnum=46474; see also Ian Fisher, "Benedict XVI and the Church That May Shrink. Or May Not," *NY Times* (May 29, 2005), WK4 (noting that Benedict, as Cardinal Ratzinger, oversaw the issuance of a Vatican document which characterized non-Christian faiths as "deficient").
107. Utter and True, *Conservative Christians,* 74–75; accord Feldman, *Divided by God*, 232; Kaplan, *With God on Their Side,* 247 (observing that members of Focus on the Family "ranked Moore's fight [to install the Ten Commandments in the Alabama State Courthouse] as second in importance only to the signing of the partial-birth abortion ban").
108. See proposed *Religious Liberties Restoration Act of 2005.*
109. Utter and True, *Conservative Christians,* 76.
110. Cf. Robert J. Bein, "Stained Flags: Public Symbols and Equal Protection," *Seton Hall Law Review* 28 (1998): 897, 921 (arguing that the Confederate battle flag cannot act as a unifying symbol of the South because it excludes southern blacks who have equal claim

with whites to the heritage of the South); Sanford Levinson, "They Whisper: Reflections on Flags, Monuments, and State Holidays, and the Construction of Meaning in a Multicultural Society," *Chicago-Kent Law Review* 70 (1995): 1081, 1100–4 (arguing that the legitimate Southern honor and pride signified by the Confederate battle flag cannot be disentangled from the racism it also signifies as a symbol of Southern resistance to abolition, desegregation, and African American civil rights) (discussing James Forman, Jr., "Driving Dixie Down: Removing the Confederate Flag from Southern State Capitols," *Yale Law Journal* 101 (1991): 505.

111. Douglas Laycock, "Church and State in the United States: Competing Conceptions and Historic Changes," *Indiana Journal of Global Legal Studies* 13 (2006): 503, 531.
112. See Karst, *Law's Promise,* 149.
113. Dan Conkle, " The Path of American Liberty: From the Original Theology to Formal Neutrality and an Uncertain Future," *Indiana Law Journal* 75 (2000): 1; Feldman, "From Liberty to Equality: The Transformation of the Establishment Clause," 673.
114. See, for example, Andrew Koppelman, *Secular Purpose*, 88 (2002): 87, 108–9.
115. Hall, "Sacred Solemnity," 80–81 (arguing that civil or "civic" religion "may force religious minorities to sever civil communion to avoid spiritual pollution," may cause separationists to forego "participation in civic occasions such as school graduation ceremonies to avoid contamination with prayers that create in their minds an unholy communion," and "will coerce citizens to deny their citizenship rather than submit to an unholy spiritual fellowship"); Massey, "The Political Marketplace of Religion," 48 (arguing that the Court's Religion Clause doctrine of legislative deference may encourage government coercion by majorities "who seek to push the judicial boundaries of establishment further to the margins, particularly when the issue involves the degree to which religious ceremony should play a part in public culture"); Shiffrin, "The Pluralistic Foundations of the Religion Clauses," 39 ("If a state is permitted to endorse a particular religion, formally creating insiders and outsiders on the basis of religion, there is good reason to fear that this formal marginalization will carry over to the social and economic spheres. Discriminating on the basis of religion would be subtly encouraged.").
116. See Jack Balkin, "Justice Scalia Puts His Cards on the Table," *Balkinization* (June 27, 2005), http://balkin.blogspot.com/2005/06/justice-scalis-puts-his-cards-on-table.html ("[W]hy did Jews and Muslims get thrown in the mix of first class religious citizens? After all, if you exclude them you still have about 91% of the population. So why couldn't the government offer prayers to Jesus Christ, our Lord and Savior? Why couldn't we say that 'Invocation of

[a Christian] God despite . . . the beliefs [of non-Christians] is permitted not because [non-Christian] religions cease to be religions recognized by the religion clauses of the First Amendment, but because governmental invocation of [Christ] is not an establishment.'") (*quoting and interlineating McCreary County v. ACLU,* 545 U.S. 844, 899–900 [2005] [Scalia, J., dissenting]).

117. See *Zorach v. Clawson*,, 343 U.S. at 313–14.
118. See *Holy Trinity Church*, 143 U.S. at 471.
119. Gedicks, "Religion at the End of Modernity," 1222; Martin E. Marty, "The Widening Gyres of Religion and Law," De Paul Law Review 45 (1996): 651, 654.; e.g. Karen Armstrong, *The Battle for God* (New York: Harper, 2000), 273 (describing contemporary American fundamentalist admiration for the theocratic governments established by early Puritan colonists).
120. See Richard D. Brown, *Modernization: The Transformation of American Life 1600–1865* (New York: Hill & Wang, 1976), 59, 98.
121. See John Rawls, *Political Liberalism* (New York: Columbian University Press, 1993), 448; Walzer, "Drawing the Line," 622.
122. See John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971), 94, 396; Walzer, "Drawing the Line," 633.
123. See Rawls, *Political Liberalism*, 38.
124. Cf. Bein, "Stained Flags," 913 (arguing that for public symbols to function as a means of uniting citizens with their country, they must project inclusive rather than exclusive meaning).

Chapter 5

In "Bad Faith": The Corruption of Charitable Choice

Steven K. Green

The Faith-Based Initiative was the centerpiece of President George W. Bush's domestic social agenda. In many respects, it could be rated as the most successful of Bush's domestic policies. Within days of assuming office, President Bush breathed life into Charitable Choice, a provision in the 1996 Welfare Reform law that allows religious social service providers to compete for government grants and contracts, and took the provision to heights the law's original sponsors could only have imagined. In his rush to empower his religious "armies of compassion" and restructure the legal and normative relationships between church and state, Bush corrupted the very program he sought to make his legacy. Although the original justifications for Charitable Choice were weak, the initial program had the promise of achieving some good by acknowledging the positive and indispensable role of religious providers in the government-funded social service system. If it had been administered in a neutral and nonpartisan manner, Charitable Choice could have served as a springboard for important discussions about the role of faith in a modern corporatist society and how to improve on collaborations between the government and religious institutions that would benefit the commonwealth. Instead, the Bush Administration transformed Charitable Choice into the *Faith-Based Initiative*, turning an already suspect program into a partisan political tool to appease his evangelical Christian base. Rather than ushering in a new era of positive church-state collaborations, the legacy of the Faith-Based Initiative will

likely be the opposite: damage to the previously workable relationship between the government and religiously affiliated charities and heightened suspicion about church-state collaborations for years to come.

At its core, the Faith-Based Initiative was a fundamentalist project. Charitable Choice was based on evangelical assumptions about human nature, personal responsibility, and the transforming power of faith. Evident in the Bush Administration's Faith-Based Initiative was a fundamentalist suspicion of secular government and its standard approaches to addressing human needs. And as addressed below, conservative evangelicals were the primary audience and intended beneficiaries of the initial legislation.[1] The Faith-Based Initiative made these religious aspects of Charitable Choice only more dominant by structuring funded programs to appeal to a conservative religious base while favoring their involvement as providers. Although participation in the Faith-Based Initiative was open to secular community-based organizations (CBOs) as well as traditional religiously affiliated agencies that eschew evangelism of beneficiaries (e.g., Catholic Charities; Lutheran Family Services), conservative religious organizations that emphasize spiritual transformation and salvation in their operations were the preferred participants.[2] Finally, the Bush Administration dropped all pretense of government neutrality toward religion by becoming the chief advocate for the transforming power of faith to address the nation's (and the world's) social ills. Thus, a fundamentalist perspective permeated the Faith-Based Initiative.

This chapter addresses three points. First, it discusses the religious assumptions and roots underlying Charitable Choice and the Faith-Based Initiative. Next, it addresses how the Bush Administration corrupted the positive aspects of Charitable Choice for political gain. Finally, it addresses the later fundamentalist bias of the Faith-Based Initiative.

Dubious Beginnings

Charitable Choice arose in 1995 as part of Congress' response to a call from President Bill Clinton to reform the welfare system.[3] Spearheaded by then-Republican Senator John Ashcroft of Missouri with the backing of conservative religious groups such as the Center for Public Justice, the Senate attached Charitable Choice to the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), which replaced the much-maligned Aid to Families with Dependent Children (AFDC) and Emergency Assistance (EA) programs with a capped entitlement program to the states called Temporary Assistance

to Needy Families (TANF).[4] On its own, the Welfare Reform Act was highly controversial, rejecting the presumption of guaranteed benefits or "entitlements" for those in need and substituting goals of privatization, devolution of authority, and reduction in welfare roles. Charitable Choice only added to the controversy by ensuring that religious organizations could compete for grants and contracts on an equal basis with nonreligious CBOs while providing protection for a participating faith-based organization's (FBO) religious character, internal structure and staffing practices.[5] Equally important, Charitable Choice dispensed with the distinction between *religiously affiliated* and *pervasively sectarian* organizations—the latter being entities where the secular and religious components are so intertwined as to be inseparable. Under the law, all religious organizations, including houses of worship, are presumptively eligible to participate in government-grant programs. Despite adding this controversial element to Welfare Reform, Charitable Choice met with President Clinton's overall desire to reform welfare and reach out to the nonprofit sector, and the president signed the law in 1996.[6]

From the beginning, Charitable Choice was designed to appease conservative evangelicals. Supporters of Charitable Choice charged that the federal (and many state) government rules governing social service contracting had wrongfully excluded those FBOs that were overly sectarian in organization or integrated spirituality or religious teachings into their programs. By expressly providing that all FBOs could compete for grants and contracts "on the same basis as any other nongovernmental provider, "without impairing the religious character of such organizations," the law claimed to "level the playing field" between religious and nonreligious social service providers.[7]

The claims of discrimination against evangelical and faith-intensive FBOs relied more on fiction than fact. Federal, state, and local agencies had long contracted and partnered with religiously affiliated agencies such as Catholic Charities, Lutheran Family Services, and the Salvation Army to meet their social service needs. In the year Charitable Choice was enacted, 1996, Catholic Charities USA received *1.3 billion* in public dollars for its programming, accounting for 62 percent of its overall budget. Catholic Charities has long been the largest private social service agency in the nation and receives more public funding than any other private nonprofit entity. Though accounting for less of their budgets, the Salvation Army, Lutheran and Jewish social services have all received hundreds of millions in public funds for their programs.[8] Advocates for Charitable Choice also argued that government policies created barriers and disincentives for small

FBOs and congregations to participate in government programs, but studies indicated that churches and small FBOs had been disinclined to make such commitments. Nevertheless, if people had listened only to the rhetoric surrounding Charitable Choice as it moved through Congress in 1995–1996, they would have been left with the impression that religious participation in public welfare programs had been minimal prior to 1996.[9]

To be sure, prior to Welfare Reform, religiously run programs and services had to be secular in order to receive public financial support, even though the services were motivated by a religious purpose and were consistent with the various agencies' religious mission. This restriction was due to the constitutional prohibition on government advancing the religious missions of churches and, more specifically, on using public funds for religious instruction, indoctrination, and worship. The prior practice also reflected the general principle that government should seek to achieve secular goals through its programs while ensuring that its services are compatible with the greatest number of recipients.[10] Even then, the older model did not prohibit any religious group from participating in government programs; rather, it limited only the *manner* of participation in order to ensure that the government funds paid for secular programs and achieved secular goals. While the old rules prohibited funds flowing to pervasively sectarian organizations, all churches and religious entities were able to set up separate, free-standing agencies to conduct social service programs with government funds while engaging their more spiritual ministries on the side. Evangelical FBOs are no more sectarian than the Catholic Church or the Salvation Army (which *is* an evangelical church); yet, these denominations found ways to work effectively within the system without abandoning their sense of mission.[11]

Even the constitutional distinction between funding religiously affiliated agencies (funding permitted) and their pervasively sectarian counterparts (funding not permitted) had often broken down in practice.[12] In many instances, government agencies did not exclude pervasively sectarian agencies from obtaining government grants and contracts provided their religious functions and public funding remained distinct. In a1996 study, Charitable Choice supporter Professor Stephen V. Monsma found that pervasively sectarian agencies regularly contracted with state and local governments to deliver social services, writing that not only are "deeply religious organizations able to participate fully in this [government] partnership, but they are also apparently able to do so without having to compromise—for the most part—their religious missions as they see them."[13] Other studies,

including a 2002–2004 study of the Faith-Based Initiative in Oregon conducted by this author, indicated that state and local agencies frequently did not distinguish between religiously affiliated agencies and their more sectarian counterparts in their contracting practices.[14]

As this was the state of practice and the law when Charitable Choice was first enacted, such that religious organizations could already engage in government grants and contracts,[15] the logical conclusion is that the purpose of Charitable Choice was to change the presumptions and rules governing public funding and regulation of religiously integrated entities and activities. Charitable Choice sought to extend the existing law to authorize not merely the funding of *faith-motivated* programs, but the funding of *faith-integrated* programs, provided public funds do not pay for overt worship, proselytization, or religious instruction (assuming those activities represent the universe of religious conduct). In essence, Charitable Choice came about primarily because evangelical agencies and churches wanted to be exempt from rules that ensured that the government was not paying for or encouraging religious activity, neutral rules that applied equally to religious and nonreligious grantees. (Evangelical agencies and churches characterized such rules differently, arguing that they interfered with their religious cohesiveness and the effectiveness of their faith-centered programs.) By extending the law, Charitable Choice introduced a new premise into the arena of government-funded religious social services: that religiously integrated social service programs were the preferred (and more valid) model of charitable work conducted by religious agencies.[16]

Charitable Choice revealed a religious bias in another way. Charitable Choice did more than ensure that evangelical FBOs were eligible to participate in funded programs; it changed the assumptions and rhetoric of welfare to reflect an evangelical worldview. As indicated by the first part of its title, the "Personal Responsibility and Work Opportunities Reconciliation Act," Welfare Reform with its Charitable Choice component stressed personal responsibility and the need to transform people's lives from within. This shift in emphasis to spirituality and moral responsibility is not surprising as the author of Charitable Choice, former Senator John Ashcroft, is a born-again Pentecostal who later as Attorney General sought to imprint his religious values on the U.S. Justice Department. For years, conservative religious writers such as Marvin Olasky and Myron Magnet had been arguing that the nation's social ills, ranging from drug addiction and teenage pregnancy to poverty itself, were as a result of "an inner defect," not economic deprivation. Rather than being victims of social and economic factors,

the poor were to blame for their plight. The primary way to instill moral responsibility in the poor was through a spiritual transformation. Thus, religious conservatives saw "altering supposedly immoral private behavior as an unquestionably legitimate goal of welfare policy—a goal best achieved by giving responsibility and resources for social services to [religious providers]."[17] As a result,

> [t]he Initiative's unstated but fundamental contention [was] that faith-based programs ought to command government funding because they influence the religious beliefs of clients. Accordingly, the Initiative assume[d] that fighting poverty effectively entails changing the moral beliefs of the poor and that government-sponsored service agencies have failed precisely because they have not done so.[18]

Despite its dubious origins and the grave legal concerns raised by its provisions—for example, the risk of funding religious activity; the likelihood of religious employment discrimination in government-funded staff positions; and the potential religious coercion of beneficiaries[19]—Charitable Choice had the promise of highlighting the important role of religious social service providers and removing some of the mutual suspicion about collaborations between government agencies and FBOs. Since the enactment of Charitable Choice, state agencies and officials have reportedly been more willing to reach out to FBOs and explore collaborations that benefit the commonwealth. Many FBOs have invaluable and unique experience in working with people in need. With the proper emphasis on creating dialogue and cooperation among government agencies and CBOs/FBOs (and with proper respect for the constitutional boundaries), Charitable Choice could have been an important step toward addressing human suffering and need.[20] Instead, President Clinton, always lukewarm to the program and mired in his own political crisis, failed to give Charitable Choice the direction it needed. As a result, Charitable Choice had little impact on the delivery of social services in America during the first four years of operation. Most state agencies, who administer the vast bulk of federal social service dollars through formula grants, continued to contract with the same CBOs and FBOs as before.

The Faith-Based Initiative

This situation changed with the election of George W. Bush as president. As governor of Texas, Bush had embraced Marvin Olasky's idea of "compassionate conservatism," which also advocated the

religious privatization of many government programs. Governor Bush had also established an advisory task force to study the implementation of Charitable Choice in his state.[21] In his run for president, Bush made Charitable Choice a centerpiece of his "compassionate conservatism" campaign, pledging to enlist "armies of compassion" to address America's social service crisis, a force that would rely primarily on religious and civic organizations: "[W]hen we see social needs in America, my administration will look first to faith based programs and community groups, which have proven their power to save and change lives."[22]

In one of his first acts upon taking office, Bush established the White House Office of Faith-Based and Community Initiatives (OFBCI) and Centers for Faith-Based and Community Initiatives within five executive departments responsible for administering social service programs. The mandate of these offices was to take the various Charitable Choice laws and mold them into a national faith-based initiative. The offices would do so by eliminating "regulatory . . . [and] programmatic obstacles to the full participation of faith-based and community organizations in the provision of social services" and "creat[ing] a hospitable environment for groups that have not traditionally collaborated with [the] government."[23] As their first task, the OFBCI and departmental offices undertook an audit "to identify all existing barriers for the participation of faith-based and other community organizations in the delivery of social services," with the direction to issue a report on the findings. Seven months later, the OFBCI issued its report *Unlevel Playing Field*, "confirming" the President's suspicions about the existence of significant and unjustified barriers to full participation by FBOs and CBOs in federal social service programs.[24]

Unlevel Playing Field declared that "[t]here exists a widespread bias against faith- and community-based organizations in Federal social service programs" demonstrated by various rules and practices restricting religious organizations from applying for funding and burdening small organizations with cumbersome regulations and requirements. The report made clear, however, that these barriers were not inadvertent or otherwise legally justified; rather, these rules, policies, and practices represented a pervasive "anti-religious bias" and "systemic discrimination" toward religion. The report's provocative language (e.g., equating government regulation of religious organizations to "an organizational strip search") set a clear tone: the government's social service agencies were hostile toward religious providers and sought to "marginalize or eliminate" the religious character of any religious organization that had the temerity to participate in a social service program.[25]

Unlevel Playing Field provided the basis for President Bush and Administration officials to argue for the expansion of the Faith-Based Initiative to ameliorate government "discrimination" against religion. Following the release of *Unlevel Playing Field* in June 2001, Bush "gave seven speeches on the Faith-Based Initiative in a 17-day stretch"; during the first three years of the Initiative, he devoted "more than 40 speeches explicitly to the Faith-Based Initiative—an average of more than one a month."[26] Bush's remarks in support of the Initiative between 2001 and 2005 frequently incorporated claims that government programs and bureaucrats purposefully discriminate against religion.[27] As the President told an audience of Philadelphia religious leaders in 2002, the time had come to "clear away the legacy of discrimination against faith-based charities. . . . The days of discriminating against religious groups just because they are religious are coming to an end."[28]

During the same time, the OFBCI launched a series of conferences to encourage congregations and FBOs to apply for federal social service grants and contracts. As Bush stated at the First White House National Conference on Faith-Based and Community Initiatives on June 1, 2004: "[W]e will reverse regulations that discriminate against faith-based organizations. There were regulations on the books that made it nearly impossible for people of faith [to participate]."[29] At the same time, Bush dropped all pretense of seeking merely to "level the playing field" by declaring his own preference for the faith-inspired services provided by FBOs. "[It is] important for our nation to recognize the promise and power of faith in America," Bush told a Tampa audience in June 2001. "We ought to fund faith-based organizations so that they can do their duty and love and compassion."[30] Two years later Bush told a Houston religious audience that the "effectiveness of [many] programs is based upon faith" and that the government must allow FBOs to "practice [their] faith" when administering programs. Yet,

> government has thwarted faith to be involved in our communities because of what they call the doctrine of separation of church and state. . . .[O]ur government must not fear the application of faith into solving social problems. We must not worry about people of faith receiving taxpayers' money to help people in need.[31]

In these and other speeches, Bush regularly emphasized the importance of religious values, embracing concepts such as "faith," "salvation," "miracles," "healing," and the "transformation of lives."

The President's clear preference for faith-based solutions even made it into the 2003 State of the Union address where he spoke of the "power, wonder-working power, of goodness and idealism and faith of the American people," when referring to the work of a FBO. The words come from the chorus of an evangelical song, "There is Power in the Blood," which heralds the "power, wonder-working power, in the blood of the Lamb." Many of the OFBCI regional conferences also infused their sessions with prayer, hymns, and other overt religious references. According to the nonpartisan Roundtable on Religion and Social Policy, one conference sponsored by the Departments of Justice and Health and Human Services "featured a gospel singer and a preacher, and resembled more of a tent revival than a government-sponsored information session."[32]

Empirical evidence of government discrimination against religious organizations was weak, with claims relying primarily on anecdotal accounts and data indicating that small FBOs received minimal award amounts under formula and discretionary grant programs.[33] As discussed above, studies predating the Faith-Based Initiative indicated that state agencies had not rigorously distinguished between religiously affiliated and religiously integrated organizations and programs when awarding grants and contracts. Three months before the release of *Unlevel Playing Field*, Amy L. Sherman of the Hudson Institute testified before the House of Representatives that "despite significant media accounts to the contrary, conservative and Evangelical faith-based organizations are notably involved in charitable choice contracting."[34] Her results were substantiated by a 2002 study of 46 Welfare-to-Work projects, which found that over 40 percent of faith-integrated programs surveyed received government funding. According to the report's authors, "This indicates President Bush's faith-based initiative . . . is not a wholly new initiative or a sharp break with current practices; instead it is an attempt to regularize and expand what is an existing public policy practice in the Untied States."[35] In addition, these same studies indicated that FBOs overwhelmingly had *favorable* working relationships with government agencies and officials. The 2002 study by the Hudson Institute concluded that "[f]ully 93 percent of the FBOs expressed satisfaction [with their relationship with the government]. Overall, nearly one-half reported that their experience with government was 'very' positive and 46 percent claimed a 'somewhat positive' experience." The study went on to state that faith-based providers generally did not see government officials as intrusive: "more than three-fifths claimed there had been 'very little intrusion' and about one-third reported only 'some intrusion.'"[36]

Again, much of this data was available at the time *Unlevel Playing Field* was being written or shortly thereafter. In her 2001 testimony before the House of Representatives, Amy Sherman stated that she had "uncovered almost no examples of faith-based organizations (FBOs) that felt their religious expression had been 'squelched' in their collaborative relationship with the government."[37] A separate 2002 faith-based study conducted by Stephen V. Monsma for the Center for Research on Religion and Urban Civil Society reached similar conclusions, describing it as "noteworthy" that "programs of all types reported largely being satisfied with their contacts with government. . . . In fact, not one of the 18 faith-based/integrated programs receiving government funds (the very programs one would expect would most likely have run into this problem) reported having to curtail any of their religious practices."[38] Finally, these conclusions were substantiated by the 2003 fifty-state study conducted by the Roundtable on Religion and Social Welfare Policy, which reported no state requirements that participating FBOs alter their organizational structure so as to minimize religious influences (and noted that only one state required FBOs to remove religious art, icons, scripture, etc., in their places of funded service). These studies directly contradicted the Administration's claims that government had discriminated against the religious character of FBOs.[39]

That being the case, what explained the massive White House push of the Faith-Based Initiative between 2001 and 2004? In a word, *politics*. Critics alleged that the White House used the Initiative to build a political base among evangelicals and low-income and minority constituencies that might otherwise vote Democratic.[40] The Bush Administration's constant drumbeat of discrimination against faith reinforced the "culture war" suspicions of conservative evangelicals while it sent the clear message that Bush was on their side. At the various OFBCI conferences and events, multimedia presentations touted the President's strong "traditional" values, his religious sympathies, and his support for the church-based programs in the black and Latino communities. According to one report, in the summer leading up to the 2002 mid-term congressional election,

> federal faith-based officials appeared at Republican-sponsored events and alongside Republican candidates in at least six states. The events often targeted black audiences, including one South Carolina event sponsored by the state Republican Party and attended by 300 black ministers, who later received letters on GOP stationary containing

> instructions on how to apply for grant money. In the days before the [2002] election, White House OFBCI Director Jim Towey also made a 20-city tour to promote the Faith-Based Initiative.[41]

The 2004 election cycle was no different, except that Bush's reelection was now at stake. OFBCI regional conferences were held in battleground states considered decisive in the outcome of the Presidential election. Oregon hosted three federal faith-based events between 2002 and 2004 and a "non-political" visit in 2004 by OFBCI director Jim Towey.[42] These activities were consistent with other reports that the Bush-Cheney reelection campaign was actively organizing in evangelical churches where supporters used the Faith-Based Initiative as evidence of the President's evangelical bona fides.[43]

Allegations also emerged that the White House was using the promise of faith-based funding—primarily under the discretionary Compassion Capital Fund (CCF)—as a get-out-the-vote motivator.[44] In August 2004, three months before what appeared to be a close election, Bush chose a Knight of Columbus convention (a conservative Catholic men's organization) to announce the award of $188 million in grants under the CCF to FBOs and CBOs.[45] The specter of a quid-pro-quo loomed large. A Philadelphia African-American minister who had endorsed Bush in 2000 received $1.4 million in grants between 2002 and 2004.[46] Similarly, television evangelist Pat Robertson, founder of the Christian Coalition with its infamous voters' guides—and initially a critic of the Initiative—received $1.5 million for his charity Operation Blessing between 2002 and 2004.[47] According to earlier reports, White House politicization of the Initiative was the reason John DiIulio resigned as Director of OFBCI in 2002; DiIulio apparently felt the Initiative "was not about 'compassionate conservatism,' as originally promised, but rather a political giveaway to the Christian right, a way to consolidate and energize that part of the base." The former OFBCI deputy director, David Kuo, who resigned in 2005, also criticized the White House for using the Faith-Based Initiative to advance Republican electoral goals.[48]

A Fundamentalist Legacy

One could pass off the foregoing as nothing more than the common manipulation of religion and people of faith for political gain. But such a critique would be incomplete. Bush's commitment to the Faith-Based Initiative extended beyond reelection politics; Bush was fully committed to the idea of integrating faith into government human service programs

as he is to the transforming power of faith, reflected by his own conversion experience. The Faith-Based Initiative was the chief example of what some have called a "faith-based presidency," where a narrow religious perspective permeated the White House and its policies. The Faith-Based Initiative was both Bush's legacy and his way of connecting to his most important constituency: evangelical Christians.[49]

Prior and subsequent to Bush's reelection, he systematically modeled government service programs to reflect his personal evangelical perspective and that of his evangelical base. The Bush Administration accomplished this in two ways: (1) by directing discretionary grants to FBOs; and (2) by changing program requirements to reflect a fundamentalist perspective. According to a 2005 report of the Roundtable on Religion and Social Welfare Policy, even though there was "a dearth of new funding in the more than 150 programs that federal agencies have listed as potential sources of funding for FBO-provided services," federal agency management and staff were "significant[ly] . . . involved in activities designed to promote the Faith-Based Initiative."[50] Because the percentage of FBO funding through state-administered formula grants had been relatively stable over past years due to the absence of new money, most attention focused on the discretionary Compassion Capital Fund, administered through the Department of Health and Human Services (HHS).[51] Between 2003 and 2004, HHS increased its funding for faith-based groups by 41 percent while HUD increased its faith-based funding by 19 percent. Federal grants to FBOs jumped to $2 billion in 2004, a 71 percent increase over 2003.[52] Although the total amount of grants to FBOs accounted for only 10 percent of all federal social service grant monies, it still represented a significant increase during a time of overall funding cutbacks. Many of the recipients under the CCF were congregations or smaller FBOs with little experience in providing social services. And many of the grants to FBOs were highly suspect. In Milwaukee, approximately $1.5 million was awarded to a FBO for sexual abstinence education whose officials were involved in a kickback scandal.[53] Rev. Sun Myung Moon's Unification Church—which espouses celestial marriage as a central religious tenet—received more than $830,000 to promote "healthy marriages" and teen celibacy.[54] In Montana, a federal court struck down a $614,500 CCF grant to the Montana Faith Health Cooperative upon finding that the FBO incorporated religious teaching and indoctrination in its funded services.[55] And HHS was forced to rescind a $1 million sexual abstinence grant to the "Silver Ring Thing" after ACLU disclosed that the distributed rings were inscribed with a New Testament verse and teenagers were encouraged to commit their lives to Jesus Christ.[56]

The increased funding of FBOs under the CCF did not occur by accident; it reflected a distinct culture among agency officials to seek out and encourage FBO participation and to model funding opportunities to match evangelical approaches to human services. On one hand, there is nothing wrong with the government soliciting underrepresented groups or providing guidance and assistance to groups unfamiliar with the grant-writing process. However, as addressed above, there was little evidence that FBOs had been excluded from participating in social service programs. And evidence indicated that most officials in the various agency faith-based offices shared the president's commitment to supporting faith-inspired solutions to human need. Religious conservatives were appointed to many key administration positions; for example, the head of the HHS faith-based office, Robert Polito, previously ran an evangelical FBO in Wisconsin that a federal court subsequently found ineligible to receive public social service grants due to its pervasively sectarian character. A former official of a Unification Church organization headed the faith-based office of the Corporation for National and Community Service which, through AmeriCorps and other entities, handed out $61 million to FBOs in 2003. Administration officials worked assiduously to make Charitable Choice even more religion friendly; as the Roundtable reported, President Bush's personal views on the role of FBOs "ha[d] been pervasively and methodically implemented in the workings of the federal government."[57] Reportedly, during the 2002 legislative push to enact House Resolution 7 (H.R.7), a bill to apply Charitable Choice provisions to all federal programs, administration officials sought ways to circumvent earlier language that prevents using public funds on religious activities, arguing that biblical and secular activities could be interwoven in funded programs "as long as you do it right and keep separate books." Biblical principles could be taught using secular language, with invitations to engage in more detailed religious conversations before or after the funded program.[58]

Administration officials also pushed funding of counseling and "soft skills" programs that lend themselves to religiously integrated approaches. Drug and alcohol counseling, marriage and family counseling, sexual abstinence education, mentoring, and AIDS prevention programs were favorites for their weighted normative aspects. Intensive programs such as Teen Challenge, which emphasizes salvation as the solution to drug dependency, were held out as the models of successful FBO services. A 2006 study confirmed that FBOs received an increase in substance abuse and family/children's counseling programs at a time of an overall decrease in federal funding.[59]

In no area was this change in emphasis more evident than with American foreign aid, primarily through USAID funded programs. Between 2002 and 2004, USAID had the highest percentage of FBOs as grant recipients—ranging from 32 to 26 percent—of any federal agency. The Bush Administration reversed many of the Clinton Administration collaborations with secular and prochoice family-planning groups, replacing those partnerships with evangelical FBOs such as Franklin Graham's Samaritan's Purse, which has the goal "to respond biblically" to AIDS. Bush reinstated Ronald Reagan's Mexico City Policy—also known as the "gag rule"—that not only restricts U.S. funding of abortion services overseas but prohibits organizations receiving any U.S. aid from using their own funds for abortion services or counseling.[60] Similarly, working with several conservative religious organizations, the Administration directed its expanded AIDS funding toward programs that emphasized abstinence and fidelity while deemphasizing the use of condoms or needle exchange programs. For example, in 2004 the government awarded Baltimore-based World Relief, an agency of the National Association of Evangelicals, a five-year, $9.7 million grant for AIDS prevention in eastern Africa and Haiti through its Bible-based "Choose Life" campaign that stresses abstinence. As a result of this reorientation of foreign aid programs to emphasize moral behavior modification, evangelical FBOs received an increasing share of U.S. grant dollars, with FBOs receiving one-quarter of the $15 billion allocated to AIDS prevention overseas.[61]

Conclusion

All administrations reflect the ideological leanings of the sitting president. Without question, voters support candidates based in part on candidate positions on social, philosophical, and moral issues, and voters expect to see those values reflected in subsequent policies. Few people would question the ability of a president to maintain church membership or even make occasional statements reflecting his faith. And several prior presidents have held strong religious beliefs and modeled their policies to reflect their particular values.[62] This raises the question of whether the Bush Administration did anything different, either normatively or constitutionally, in its promotion of the Faith-Based Initiative?

Distinct differences exist between the administration of George W. Bush and other devout presidents, such as Rutherford B. Hayes, Woodrow Wilson, and Jimmy Carter, all of whom were also evangelical. No other president, with the possible exception of Ronald Reagan, so closely aligned himself with a religious movement

that distinguishes itself by its theological and political exclusivity. No other president, Reagan included, so openly embraced the theology and related social/moral agenda of a religious group. And no other president so aggressively sought to align official government policies with positions of sectarian faith.[63]

Previous religiously devout presidents have intuitively known where to draw the line between personal faith and official policy. And previous presidents of both parties—again with the possible exception of Ronald Reagan—appreciated the importance of separation of church and state for preserving religious liberty, equality, and government legitimacy. The need for a national leader to sometimes take a moral stance on social issues is not the same as modeling public policies to reflect a contested religious perspective. The mandate of government neutrality toward religion is more than a constitutional requirement; it reflects a political acknowledgment of the nation's religious diversity and of the inherent dangers to democracy when the government too closely aligns itself to any religious faith. Finally, it is a covenant between the government and Americans of all religious beliefs (or with none) that the former will avoid religious favoritism and respect all religious traditions. As former President Jimmy Carter wrote in 2005, "There are obviously sincere differences of opinion within the religious and political life of our nation, and this is to be expected. It is the unprecedented combined impact of fundamentalism in religion and politics that has helped to create the deep and increasingly disturbing divisions among our people."[64] Jimmy Carter would be the first to contest that he compromised his faith by adhering to constitutional principles in carrying out his presidential duties. Unfortunately, Carter's lesson was lost on George W. Bush.

Notes

1. Here, the term "fundamentalist" is used in a descriptive, rather than in a normative manner; it is intended to represent a conservative evangelical theology and worldview that espouses biblical literalism and promotes salvation as the means to address human needs. As traditionally understood, fundamentalism is a reaction to and evinces a distrust of modernity and secular culture. See generally, George M. Marsden, *Fundamentalism and American Culture* (New York: Oxford University Press, 1980).
2. As used herein, a faith-based organization (FBO) encompasses both the more traditional religiously affiliated social service agencies and their more religiously integrated counterparts.

3. This section is based in part on my previous article, "'A Legacy of Discrimination'? The Rhetoric and Reality of the Faith-Based Initiative: Oregon as a Case-Study," *Oregon Law Review* 84 (2005): 725.
4. 141 Cong. Rec. S11,640 (1995). See Julie A. Segal, "A 'Holy Mistaken Zeal': The Legislative History and Future of Charitable Choice," in *Welfare Reform & Faith-Based Organizations*, ed., Derek Davis and Barry Hankins (Waco, TX: J. M. Dawson Institute, Baylor University,1999), 9–27; Jo Renee Formicola, "The Good in the Faith-Based Initiative, in *Faith-Based Initiatives and the Bush Administration: The Good, the Bad, and the Ugly*, ed., Jo Renee Formicola, Mary C. Segers, and Paul Weber (Lanham, MD: Rowman & Littlefield, 2003).
5. See 42 U.S.C. § 604a(b), (c), (d)(2), & (f);Lewis D. Solomon and Matthew J. Vissides, Jr., "Faith-Based Charities and the Quest to Solve America's Social Ills: A Legal and Policy Analysis," *Cornell Journal of Law and Public Policy* 10 (Spring 2001): 265, 271–74.
6. *Bowen v. Kendrick,* 487 U.S. 589, 610–612 (1988); *Hunt v. McNair,* 413 U.S. 734, 743 (1973). See Michele Estrin Gilman, "Fighting Poverty with Faith: Reflections on Ten Years of Charitable Choice," *Journal of Gender, Race and Justice* 10 (2007): 395, 400–402; Segal, "A 'Holy Mistaken Zeal'," 22–23 (describing the Clinton Administration's mixed signals of support for Charitable Choice).
7. 42 U.S.C. § 604a(b). See Carl H. Esbeck, "The Neutral Treatment of Religion and Faith-Based Social Service Providers: Charitable Choice and its Critics," in Davis and Hankins, *Welfare Reform*, 177 ("[T]he exclusion of certain religious providers based on what they believe and because of how they practice and express what they believe, is discrimination on the bases of religious exercise and religious speech.").
8. See Catholic Charities USA 1997 Annual Report, 24–25; The Aspen Institute Nonprofit Sector Research Fund, *Religion-Sponsored Social Service Providers* (1997), 23–31, 48–50; Stephen V. Monsma, *When Sacred and Secular Mix: Religious Nonprofit Organizations and Public Money* (Lanham, MD: Rowman & Littlefield, 1996).
9. See Mark Chaves, "Testing the Assumptions: Who Provides Social Services?," in *Sacred Places/Civic Purposes*, ed. E. J. Dionne and Ming Hsu Chen (Washington, DC: Brookings Institution Press, 2001), 287–96.
10. *Bowen v. Kendrick,* 487 U.S. 589, 609–610 (1988); *Grand Rapids School Dist. v. Ball,* 473 U.S. 373, 385 (1985); *Bowen,* 487 U.S. at 607n11.
11. See *Salvation Army v. Dept. of Community Affairs,* 919 F.2d 183, 187–189 (3rd Cir. 1990); *McClure v. Salvation Army,* 323 F. Supp. 1100 (N.D. Ga. 1971), aff'd, 460 F.2d 553 (5th Cir.), cert. denied, 409 U.S. 896 (1972); Charles L. Glenn, *The Ambiguous Embrace: Government and Faith-Based Schools and Social Agencies* (Princeton: Princeton University Press, 2002), 212–40.
12. *Bowen,* 487 U.S. at 610, 612 ("Only in the context of aid to 'pervasively sectarian" institutions have we invalidated an aid program

on the grounds that there was a 'substantial' risk that aid to these religious institutions would, knowingly or unknowingly, result in religious indoctrination. . . . [W]hen the aid is to flow to religiously affiliated institutions that were not pervasively sectarian . . . we refused to presume that it would be used in a way that would have the primary effect of advancing religion.").

13. Monsma, *When Sacred and Secular Mix*, 98 (noting that "70 percent or more [religious nonprofits] reported no problems [in their relationships with the government.]"). See also Mark Chaves and William Tsitsos, "Are Congregations Constrained by Government? Empirical Results from the National Congregations Study," *Journal of Church & State* 42 (Spring 2000): 335, 342 ("[I]t is extraordinarily uncommon for congregations to be denied permission by government authorities to engage in the activities in which whey wish to engage.").
14. See *Report of the Oregon Law Commission Non-Profit Social Service Delivery Study Group*, December 12, 2003, summarized in Steven K. Green, "A Legacy of Discrimination?": 725. See also Stephen V. Monsma, "The 'Pervasively Sectarian' Standard in Theory and Practice," *Notre Dame Journal of Law, Ethics, and Public Policy* 13 (1999): 321, 322 (documenting a "lively, continuing partnership between government and nonprofit service organizations, including faith-based ones").
15. See Monsma, *When Sacred and Secular Mix*, 63–108.
16. Formicola, "The Good in the Faith-Based Initiative," 28–45; Esther Kaplan, *With God on Their Side* (New York: New Press, 2004), 34–59.
17. See Kaplan, *With God on Their Side*, 83–85, 46–47; Formicola, *Faith-Based Initiatives*, 103–4; Thomas W. Ross, "The Faith-Based Initiative: Anti-Poverty or Anti-Poor?" *Georgetown Journal on Poverty Law & Policy* 9 (2002): 167, 175.
18. Ross, "The Faith-Based Initiative," 177.
19. A fuller discussion of the legal concerns can be found in the following articles: Ira C. Lupu, "The Faith-Based Initiative and the Constitution," 55 *DePaul L. Rev.* 1 (Fall 2005); Steven K. Green, "Religious Discrimination, Public Funding, and Constitutional Values," 30 *Hast. Const. L. Quart.* 1 (Fall 2002); Steven K. Green, "Charitable Choice and Neutrality Theory," 57 *N.Y.U. Ann Sur. Am. L.* 33 (2002).
20. See Martha Minow, "Partners, Not Rivals?: Redrawing the Lines Between Public and Private, Non-Profit and Profit, Secular and Religious," 80 *B.U.L. Rev.* 1061 (2000); Green, "A Legacy of Discrimination?" *Oregon Law Review* 84: 773–77.
21. Marvin Olasky, *The Tragedy of American Compassion* (Washington, DC: Regnery Gateway, 1992); Kaplan, *With God on Their Side*, 46–48; Mary Segers, "President Bush's Faith-Based Initiative," in *Faith-Based Initiatives*, 1–5. See *Faith in Action . . . A New Vision for Church-State Cooperation in Texas*, Governor's Advisory Task Force on Faith-based Community Service Groups, December 1996.

22. President George W. Bush, Statement of Jan. 29, 2001, at http://www.whitehouse.gov/nwes/releases/20010129.5.htm.; Michelle Dibadj, "The Legal and Social Consequences of Faith-Based Initiatives and Charitable Choice," 26 *S. Ill. U. L.J.* 529 (2002).
23. Exec. Order No. 13,199, 66 Fed. Reg. 8499 (Jan. 31, 2001); Exec. Order No. 13,198, 66 Fed. Reg. 8497 (Jan. 31, 2001) (Health and Human Services; Labor; Housing and Urban Development; Education; and Justice). The development of the Bush Administration's Faith-Based Initiative is described in more detail in Gilman, "Fighting Poverty," 402–3; Green, "A Legacy of Discrimination," 732–44. See *Rallying the Armies of Compassion*, Office of the White House, January 2001, 16.
24. Exec. Order No. 13,198, 66 Fed. Reg. 8497 (Jan. 31, 2001). That the report would confirm such suspicions was never in doubt, as the Executive Order provided that the report "shall include . . . a comprehensive analysis of the barriers to the full participation of faith-based and other community organizations in the delivery of social services." Ibid.
25. *Unlevel Playing Field*, 2, 4, 11, 13, 17, 18. The report attacked the "'no-aid' strict separationist framework that permitted Federal funding only of religiously affiliated organizations offering secular services in a secularized setting, [while denying] equal treatment to organizations with an obvious religious character." Of note, the report distinguishes between religiously affiliated organizations and religiously infused entities where it supports the discrimination argument, while combining the two entities in other places when discussing the range of potential services by FBOs. Ibid. at 11–13.
26. "Unlevel Playing Field became the backbone of an administrative strategy to encourage governmental partnerships with faith-based organizations." See *The Expanding Administrative Presidency: George W. Bush and the Faith-Based Initiative*, The Roundtable on Religion and Social Welfare Policy (August 2004), 7, 5.
27. See President's Highlights Faith-Based Initiative at Leadership Conference, March 1, 2005, available at www.whitehouse.gov/news/releases/2005/03. ("[We must] continue to build our culture of compassion by making sure state and local agencies do not discriminate against faith-based and community programs when they hand out federal dollars."); Remarks by the President to Faith-Based and Community Leaders, January 15, 2004, available at www.whitehouse.gov/news/releases/2004/01 ("[O]ur governments have, frankly, discriminated against faith-based programs. It's the truth."); Remarks by the President at the Power Center, September 12, 2003, available at www.whitehouse.gov/news/releases/2003/09 ("The discrimination against faith-based programs at the federal level prevents us from using all our resources to save lives. . . .And so one of my missions is to work with people to end the discrimination in Washington, D.C. against faith-based programs."); President Bush Implements Key

Elements of his Faith-Based Initiative, December 12, 2002, available at www.whitehouse.gov/news/releases/2002/12 ("Many acts of discrimination—many acts of discrimination against faith-based groups are committed by Executive Branch agencies.").

28. President Bush Implements Key Elements of his Faith-Based Initiative, December 12, 2002, available at www.whitehouse.gov/news/releases/2002/12.
29. See Remarks of the President at the First White House National Conference on Faith-Based and Community Initiatives, June 1, 2004, available at www.whitehouse.gov/news/releases/2004.
30. Remarks by the President to Habitat for Humanity Supporters, June 5, 2001, available at www.whitehouse.gov/news/releases/2001/06.
31. Remarks by the President at the Power Center, September 12, 2003, available at www.whitehouse.gov/news/releases/2003/09.
32. See Joe Conn, "Presidential Alter-Call," *Church and State*, March 2003; *Expanding Administrative Presidency*, 15.
33. *Unlevel Playing Field*, 4–7 (indicating that in FYs 2000 and 2001, FBOs received only 2 percent and 0.3 percent of discretionary grant funds from the Departments of Education and Justice, respectively).
34. Monsma, *When Sacred and Secular Mix*, 67–69. See *Testimony of Amy L. Sherman, Senior Fellow, Hudson Institute before the Subcommittee on the Constitution*, U.S. House of Representatives' Committee on the Judiciary, April 24, 2001.
35. Stephen V. Monsma and Carolyn M. Mounts, *Working Faith: How Religious Organizations Provide Welfare-to-Work Services* (Charlottesville, VA: Hudson Institute, 2002), 14.
36. Ibid., 27. See also John C. Green and Amy L. Sherman, *Fruitful Collaborations: A Survey of Government-Funded Faith-Based Programs in Fifty States* (Washington, DC: Hudson Institute, September 2002).
37. *Testimony of Amy L. Sherman, Senior Fellow, Hudson Institute before the Subcommittee on the Constitution*, U.S. House of Representatives' Committee on the Judiciary, April 24, 2001, 1. Sherman made the same observation a year earlier in a preliminary review of her findings in nine states, noting that "the study uncovered almost no examples of FBOs who felt their religious expression had been 'squelched' in their collaborative relationship with government." Amy Sherman, "Should We Put Faith in Charitable Choice?" *The Responsive Community* 10 (Fall 2000): 22, 26.
38. *Working Faith,* 17, 18 (noting that 70 percent of FBOs report that they are very or usually satisfied with their contacts with government"). "Many may be surprised at the lack of reported government limitations on religious practices in programs it helps fund. The more one actually gets out in the field and observes on-going programs, the more irrelevant many of the Washington and academic government-funding debates appear." Ibid., 18.

39. Mark Gagan, Lisa M. Montiel, and David J. Wright, *Scanning the Policy Environment for Faith-Based Social Services in the United States,* The Roundtable on Religion and Social Welfare Policy (October 2003), 15. The identity of the state was not provided.
40. See Rob Boston, "Bush's Faith-Based Revival," *Church & State*, March 2004, available at www.au.org; Ori Nir, "Study Suggests Faith-Based Effort Used as a Partisan Tool," *The Forward*, October 1, 2004, available at www.religionandsocialpolicy.org/news/article; Formicola, *Faith-Based Initiatives*, 117.
41. *Expanding Administrative Presidency,* 16.
42. Boston, "Bush's Faith-Based Revival"; Nir, "Study Suggests Faith-Based Effort Used as a Partisan Tool." All four Oregon events were attended by this author.
43. See Alan Cooperman, "Churchgoers Get Direction From Bush Campaign," *Washington Post*, July 1, 2004, A06.
44. See Boston, "Bush's Faith-Based Revival" ("The renewed push also gives Bush an entrée into the African-American community, a segment of the population that remains largely unsupportive of the president. During his speech at Bethel African Methodist Episcopal Church in New Orleans [on January 15, 2004], a black congregation near a public-housing complex, Bush promoted the "faith-based" initiative and the idea of government funding of religiously tinged social services in a hard-hit area. Bush political strategists have talked openly about using the initiative to woo black support, aware that drawing even a few percentage points of the African-American vote away from the Democrats could make a difference in a tight election.")
45. See White House New Release, August 3, 2004, available at www.whitehouse.gov/news/releases/2004.
46. See Laurie Goodstein, "Minister, a Bush Ally, Gives Church as Site for Alito Rally," *New York Times*, January 5, 2006.
47. See Bill Sizemore, "Fewer Ties Binding Faith-Based Federal Aid", *Duluth News-Tribune*, January 22, 2006; Anne Farris, *A Look at Compassion Capital Funding One Year Later*, Roundtable on Religion and Social Welfare Policy, October 21, 2003, available at www.religionandsocialpolicy.org/news/article.
48. Ron Suskind, "Without a Doubt," *New York Times Magazine*, October 17, 2004; J. David Kuo, *Tempting Faith: An Inside Story of Political Corruption* (New York: Free Press, 2006).
49. "This is one key feature of the faith-based presidency: pen dialogue, based on facts, is not seen as something of inherent value. It may, in fact, create doubt, which undercuts faith." Suskind, "Without a Doubt."
50. Mark Ragan and David J. Wright, *The Policy Environment for Faith-Based Social Services in the Untied States: What has Changed Since 2002?* The Roundtable on Religion and Social Welfare Policy (December 2005), 2.

51. See *Implementing the Federal Faith-Based Agenda: Charitable Choice and Compassion Capital Initiatives*, The Urban Institute (December 2005), available at www.urban.org/publications.
52. Nir, "Study Suggests Faith-Based Effort Used as a Partisan Tool; U.S. Gave $1.17 Billion to Faith-Based Groups in 2003," Associated Press, Jan. 3, 2005, available at www.firstamendmentcenter.org/news; Tom Heinen, "Millions Granted to Faith Programs," *Milwaukee Journal Sentinel,* June 26, 2005; Nancy Cook Lauer, "State Funding for Faith-Based Groups on the Rise," The Tallahassee Democrat, March 20, 2005. See generally, Michelle Estrin Gillman, "If at First You Don't Succeed, Sign an Executive Order: President Bush and the Expansion of Charitable Choice," 15 *Wm & Mary Bill of Rts. J.* 1103 (April, 2007).
53. Heinen, "Millions Granted to Faith Programs."
54. Don Lattin, "Moonies Knee-deep in Faith-Based Funds—Pushing Celibacy, Marriage Counseling Under Bush Plan," *San Francisco Chronicle,* October 3, 2004.
55. Press Release: "Foundation Wins Second Lawsuit on Faith-Based Funding in its Montana 'Parish Nursing' Case," Freedom From Religion Foundation, October 27, 2004, available at www.ffrf.org.
56. Frank James, "Faith-Based Organizations Face Suits," *Chicago Tribune,* January 2, 2005.
57. Steve Benen, "Faith-Based Flimflam," *Church and State* (October 2002): 4–8; *Expanding Administrative Presidency*, 19; see also Kaplan, *With God on Their Side*, 83–85; Latin, "Moonies Knee-Deep"; *Expanding Administrative Presidency,* ii (executive summary).
58. Formicola, *Faith-Based Initiatives,* 147–48. When Congress failed to enact a comprehensive law, Bush signed an Executive Order seeking to accomplish the same goals. See Gilman, "If at First You Don't Succeed," passim.
59. *Expanding Administrative Presidency* at 22–27; Formicola, *Faith-Based Initiatives*, 26–27; Kaplan, *With God on Their Side*, 55–57; Lisa M. Montiel and David J. Wright, *Getting a Piece of the Pie: Federal Grants to Faith-Based Social Service Programs*, Roundtable on Religion and Social Welfare Policy (February 2006), 8, 17–18.
60. *Getting a Piece of the Pie*, 7, 10–11; David Crary, "Emboldened by Ties to Bush Administration, U.S. Conservatives Step Up Activities Oversees," *North County Times* (San Diego), January 14, 2006; Kaplan, *With God on Their Side*, 167–93, 219–20.
61. See Scott Calvert, "Abstinence, Not Condoms, is the Word in Mozambique," *Baltimore Sun,* April 2, 2006; Rita Beamish, "Religious Groups Getting Nearly One-Quarter of Bush Administration's AIDS Money," *Associated Press,* January 30, 2006. See also Kaplan, *With God on Their Side*, 186–90.

62. See generally, Robert S. Alley, *So Help Me God: Religion and the Presidency* (Richmond, VA: John Knox Press, 1972); Mark J. Rozell and Gleaves Whitney, eds., *Religion and the American Presidency* (New York: Palgrave Macmillan, 2007).
63. As one critic of the Bush Administration's foreign aid policies has remarked, "[t]he collaboration of right-wing NGOs and the Bush administration far exceeds any collaboration between pro-choice family groups and the Clinton administration." Crary, "Emboldened."
64. Jimmy Carter, *Our Endangered Values: America's Moral Crisis* (New York: Simon & Schuster, 2005), 101.

Part II

Beyond United States Protestant Fundamentalism

Chapter 6

Islamicism: Jihad and Fostering Political Islam in the United States

Brian Robert Calfano

The intersection of religious fundamentalism and political life among American Muslims is a complex one (to say the least). Aside from the historical challenges that American Muslims have faced as a fairly fractured immigrant community with pronounced ethnic and racial differences, Muslims have had to endure the difficulties associated with life in America post September 11.[1] The legal system question since September 11 has been understandably tricky for Muslims. By October 2001 a majority of respondents to a national Muslim survey reported that they or someone they knew had experienced some form of discrimination.[2] Slightly more African American and Arab Muslims reported such negative experiences than South Asians or Africans. Fully two-fifths reported discrimination after September 11, and three-fifths reported knowing a victim of discrimination. Of those surveyed 37 percent reported no discrimination against themselves or others they knew, suggesting a slight increase in such problems since 2001.[3] By any standard, these figures are high.

Two-fifths of American Muslims in the 2001 survey agreed with the statement: "In my experience and overall, Americans have been respectful and tolerant of Muslims".[4] On this response, there was some variation by ethnic group. More than one-half of South Asians agreed with this statement, but less than one-third of African Americans.

By 2004, agreement with this statement had fallen to less than one-third overall, and had declined in every ethnic group (although the intergroup differences remained). By a 2004 survey, a plurality of Muslims agreed that "Americans have been respectful and tolerant of Muslims, but American society overall is disrespectful and intolerant of Muslims." One-sixth located the problem in a subset of America, while 12 percent said Americans in general were intolerant.[5]

There is also evidence that American Muslims are generally not satisfied with American political society. Overall, two-thirds of the 2004 survey respondents were dissatisfied, and many of those were very dissatisfied, particularly African Americans (84 percent) and the Other Muslims (70 percent). South Asians were the least dissatisfied (54 percent). This dissatisfaction may reflect Muslim perception of the American news media: just one-quarter of Muslims felt the media portrays Muslims fairly. There was some variation between groups, with African Americans the least supportive (18 percent) and South Asians the most (34 percent). However, there was an even more negative perception of Hollywood's portrayal of Muslims and Islam: just 14 percent of respondents said Hollywood's portrayal was fair, with the same distribution of ethnic group support as with the media.[6]

Politically speaking, American Muslims have vacillated between support for both the Democratic and Republican parties. Overall, Muslim Americans tend to hold conservative views on moral issues, including policies pertaining to sexuality and the public expression of religion. This places them closer to the positions taken by George W. Bush in 2000 and 2004 and John McCain in 2008. For example, recent opinion polls show 55 percent of Muslims favored limiting abortion, 85 percent opposed same-sex marriage, and three-quarters favor banning the sale of pornography, with only modest variation by ethnicity. Roughly two-thirds favor faith-based social services and school vouchers.[7]

What about Muslim Americans views on foreign policy? Just two-fifths of the community supported the war in Afghanistan by 2004, and even less backed the war in Iraq. On the latter, one-sixth or less believed the Iraq war was worth the cost, supported the war effort, or backed sending more U.S. troops to that country. These patterns reflect the view that the Iraq war could have destabilized the region, encouraged more terrorism in the United States, and not brought democracy to the Middle East. American Muslims clearly preferred a nonmilitary approach, believing that terrorism is best combated by reducing inequalities in the world.[8]

Between 1996 and 2001, more than two-fifths of Muslim Americans identified as Democrats, a little under one-third as

independents, and the remaining one-quarter as Republicans. A majority of African Americans were Democrats, as was a plurality of every group. Arabs and South Asians, the most affluent, were the most Republican. However, support for the Democratic Party was relatively low for recent immigrant groups, which historically have tended to identify strongly with the Democrats.[9]

By 2004, Muslim American partisanship had changed substantially, so that a clear majority identified as Democrats. Meanwhile, Republican identification was cut by one-half, falling to 12 percent. The Democrats made major gains among all the ethnic groups except African Americans, who were already heavily Democratic. The biggest gain was some 20 percentage points among Africans. No doubt these changes reflected the policies of the Bush administration after September 11. In addition, this shift reveals how malleable partisan identification can be, especially among recent Muslim immigrants. According to one 2008 opinion poll of the community, 59 percent of American Muslims identify themselves as Democrats.[10]

What level of support did Muslims provide Barack Obama in 2008? According to a national opinion poll of American Muslims conducted in the months immediately following the 2008 election, 81 percent of Muslims voted for Obama, with 80 percent of male and 85 percent of female Muslims supporting the president. This makes American Muslims the second most supportive group of the Obama candidacy in 2008—behind African Americans.[11]

These figures tell the story of an American Muslim community that is generally skeptical of its place and future in American politics and society, but who may have reason to carry on as torchbearers for their faith nonetheless. The question as to whether and why American Muslims might continue to push for recognition and appreciation of their faith identity in the face of these circumstances is a provocative one. My contention is that a basic commitment to Islamic fundamentalism, specifically defined and shared by a majority of Muslims in the United States, is responsible. This fundamentalism is also responsible for placing American Muslims in the position of trying to live their faith while peaceably existing in communities where they are outnumbered and often misunderstood. In order to explore the effect these cross-pressures have on Muslim behavior, I investigate American Muslim life in a setting of great tension—a relatively small Midwestern city with an almost nonexistent Muslim community. My focus on Muslim fundamentalism is based primarily on an interpretation of jihad, which is considered in greater detail in the following section.

JIHAD AND AMERICAN MUSLIMS

The purpose of this chapter is to consider the circumstances surrounding how American Muslims uphold a religious identity that reflects elements of fundamentalism related to personal jihad while living in a political environment that does not make this type of religious practice easy or is amenable to adopting a Muslim conception of democracy. In order to facilitate this study, I first turn attention to a working definition of Islamic fundamentalism that can be most appropriately applied to the majority of American Muslims. Then, I discuss two theoretical constructs that might help to set the basis for understanding how Muslim fundamentalism may be successfully lived out in a pluralistic, areligious democracy, such as the United States. Finally, I draw on focus group data from a select set of Muslims who were asked to reflect on how their goal for personal jihad may be successfully lived out in their nation of residence.

To begin, it is essential to call into question the more stereotypical association of jihad with violence and terrorism. While terrorists have certainly used this interpretation of the term as a rationale for their behavior, the term jihad actually has multiple meanings that are not directly related to violence at all.[12] Given that several national opinion polls of American Muslims have found significant and consistent levels of religious devoutness among believers,[13] I argue that the best way to conceive of Islamic fundamentalism among American Muslims is to focus on what scholars have found to be the *reinterpretation* of jihad into a personal call for individual Muslims to practice and uphold Islam's five pillars.[14]

Though there are sizable percentages of Muslims who admit to not fulfilling all of the pillars consistently[15] (especially in terms of daily prayer—*salat*), defining Islamic fundamentalism as fulfillment of the five pillars is the most logical way to proceed for Muslims living in America. This is because, unlike other potential definitions of jihad, which may reflect more radical forms of behavior, including lawbreaking and social subversion, the vast majority of American Muslims have the freedom to both pursue the five pillars *and* function as productive members within the framework of American law and politics. Whether and how Muslims are able to accomplish these goals remains to be considered.

Despite the potential fit between a personal call to jihad and living successfully under what might be best termed American political values and culture, it is likely not clear to some readers that Islam and democracy are compatible in any form. I argue to the contrary, however, and draw upon theoretical insights from two different interpretations

of Islam's role in politics to make the case for a conception of Islamic democracy that may be useful for American Muslims as they pursue jihad. What follows is a brief discussion of some of the theoretical terrain on the subject. Before continuing, however, it is important to keep in mind that any conception of how democracy and Islam might be successfully intertwined must invariably confront a clear reality of Islam—ecclesiastical decentralization. Specifically, and unlike religions such as Christianity, Islam does not possess a hierarchy of clerics who can claim interpretive authority over the Koran in the same manner that, for example, Roman Catholic bishops and the Pope can determine the Church's interpretation of the Bible. This puts Islam in a unique position since the development and inculcation of an Islamic democratic theory depends on the legitimacy granted to it by Islam's spiritual leaders. The relative disadvantage to the democratic theory is that no single interpretation can reasonably exist if there is little to compel Islamic leaders to adopt and advance it. Concomitantly, decentralization fosters a veritable marketplace of ideas in Islam, where imams and other spiritual leaders are free to reconstitute Islam's relationship to the political and legal realms in ways that may provide opportunities for compatibility between Islamic principles and democratic society.

Theories of an Islamic Democracy

In determining what an Islamic democracy might look like within the confines of American politics and law, I briefly draw on the thinking of Maududi and Qutb, two important Islamic theorists with a substantial history of considering the question of how Islam may be best related to the concept of democracy.[16] From Maududi's perspective, democracy based on popular rule is compatible with Islam since the collective action associated with democratic action would, necessarily, represent Allah's will. In other words, and in Maududi's estimation, individuals would only act in ways that are in accord with Allah and His teachings through the Prophet. The mechanism ensuring democracy, in Maududi's estimation, is that all people are vested with the responsibility to represent Allah and His will, thereby providing a strong basis for social equality and morality (which Maududi spends considerable time explaining is the prime concern of political Islam).

Such responsibility is not to be taken lightly, as Maududi believes that all Muslims are responsible for seeing Allah's will brought to bear in the political realm through the selection of qualified leaders. Though some may argue with this assessment, Maududi would also likely characterize his Islamic democracy as ecumenical, given

his views that Muslims, Christians, and Jews share many of the same objectives that Islamic democracy emphasizes.

In contrast, Qutb is less ecumenical than Maududi, and suggests that Islamic democracy (a term that he does not actually use) is superior to secular or other religious forms of government because Islam is concerned with what he determines to be a more appropriate dual emphasis on supporting humanity's spiritual and material needs. Qutb sees this emphasis as different from what secular capitalism, or even Christian visions of democracy, promotes (in those cases, either materialism or spiritualism is emphasized at the expense of the other). For Qutb, Islam's attention to the complete needs of the individual makes it superior to any other theoretical basis of government. At its core, Qutb's Islamic government promotes *shura* or collaboration between political leaders and the public, thereby ensuring both the representation of the public will, however defined, and accountability on the part of public officials. It is their joint sense of obligation to Allah that ensures that both the rulers and the public engage in *shura* in a mutually beneficial manner.

The basic similarity between Maududi and Qutb's theories is their assumption that publics and the government can and should reflect a consistent religious ethic. Though Maududi is clear that the values inherent in an Islamic democracy can be shared by Christians and Jews, the underlying premise that a government presiding over a religiously pluralistic society can, necessarily, favor the tenets and assumptions of one faith over another echoes the ongoing debate within the United States over how much ostensible influence and representation Christianity should have in government. While this raises an intriguing question about the compatibility of an Islamic democracy with Western notions of representative governance, this is an issue more appropriately addressed in subsequent research.

What the conceptions of Islamic democracy, as furthered by Maududi and Qutb, do provide, however, is a lens through which to understand the potential goals or visions American Muslims might have of how their personal religious identity and devotion may be successfully lived out and recognized within the history, expectations, and political context of their nation of residence. The undercurrent of religious freedom in American history provides even more reason to consider the specifics of living out Muslim fundamentalism in the United States, in part, because the creed of religious freedom, though enshrined in American jurisprudence, is not necessarily provided to religious out-groups—especially when coreligionists are geographically disjointed. It is rather ironic that a nation with great

sensitivity to the role of religion in public life is at least perceived as inhospitable to Muslims seeking to have their religious sensibilities reflected in government action.

All of this leaves American Muslims in a peculiar situation. On the one hand, their commitment to fundamentalism through jihad requires a level of personal devotion whose natural form of expression would most likely be found in the commitment of the civil government to the aims of economic and civil justice, equality, and fairness—all of which reflect the basic contours of the Maududi and Qutb theories. On the other, and because of the out-group status Muslims, and Islam more generally, hold in the United States,[17] realizing the union of personal fundamentalism with a government reflective of Islamic political values, is highly unlikely. This does not, however, abrogate the responsibility that a Muslim fundamentalist would likely feel toward fulfilling the principles of jihad, which would include proclaiming Islamic principles. As such, fundamentalist American Muslims, or at least those indicating an awareness of their accountability in jihad, likely feel cross-pressured between their spiritual responsibilities and the desire to live out these responsibilities in a manner that is both fully spiritual and fully practical—what Qutb describes as the essentially Islamic approach to addressing human needs through government.

It is here that I begin the assessment of Muslim fundamentalism's interaction with life in contemporary America. Of greatest interest are the potential sacrifices that Muslims make in living out their commitment to jihad within the context of American society. Though several studies have examined the condition of Muslims in America, none have done so from the perspective of understanding the dynamic pressures inherent in pursuing personal fundamentalism and (potentially, at least) a public manifestation of Islamic principles in government among those living in an area with a notably small Muslim community. Given the unique situation that Muslim fundamentalists may be found to inhabit, and the effect this may have on their pursuit of jihad and a more public or government manifestation of Islam, this kind of study is long overdue in the relevant literature.

Fundamental Muslims in a Fundamentally Non-Muslim Context

The tradeoffs inherent in the personal negotiation of fundamentalism and American law and politics is seen clearly in the reactions of Muslims who participated in three focus groups in Springfield, Missouri, during

early and mid-January 2010. Overall, the Springfield Islamic community is small—constituting a few hundred regular members in a metropolitan area of approximately 200,000. The center of the Springfield Muslim community is an Islamic Center that until recently was housed in a rented space. The Center has come under scrutiny because of contributions to an organization suspected of supporting terrorism—a charge that it, and the local Islamic community, strongly denies. The scrutiny likely produced by this accusation might serve to elevate the out-group self-perception among Muslims in the town.

Focus group interviews were conducted with fifteen members of the Springfield Muslim community. The interviews took place in small focus group settings with three to five participants in each group. The format was conversational, with the interviewer posing some general questions about the respondents' experiences as Muslims in Springfield and their view of the American legal and political systems. Twelve of the fifteen respondents identified themselves as Democrats and three as Republicans. Nine were professionals (doctors, college professors, lawyers, etc.) and six were university students. Only one respondent was female. Participants were put in touch with me via assistance from members of the Islamic Center of Springfield. Participants were of Asian (three), Arab (nine), and African American (three) backgrounds.

Springfield is a useful place to examine the relationship between religious status and politics, especially considering the small size of the Muslim community. It is here that one would expect individual Muslims to have the sense that they belong to an out-group, especially given the sizeable fundamentalist Christian community in this region of the United States. Arguably, Springfield presents its resident Muslims with fewer resources to develop a socially insular environment, largely because there are too few Muslims to create a distinct sense of religious community that is sufficiently separate from the non-Muslim population. This stands in contrast to the much larger American Muslim communities in urban areas such as northern New Jersey, Houston, and Dearborn, Michigan. At issue, therefore, is the basic question of how Muslims in communities with very few coreligionists behave. While American Muslims have certainly been found to face assimilationist pressures when living among large numbers of coreligionists, it is unclear what effect a much smaller Muslim community might have on the living out of fundamentalism.

The obvious issue of interest regards how Muslims personally negotiate their religious identities in the context of living not only in the United States, but in an area of the country in which their actions are

likely to receive greater scrutiny because they cannot seek refuge in a robust religious subculture. Arguably, an integral part of determining one's identity as a Muslim in America is understanding how to best fulfill one's responsibility to Allah while functioning within the larger legal and political culture of their nation of residence. Despite the theoretical perspectives offered by Maududi and Qutb concerning Islamic democracy, the indeterminate nature of the intellectual debate among Muslim scholars in regard to how Islamic values and principles might be successfully melded within America's capitalist and pluralist society, suggests that, at the individual level, the experience of living as a fundamentalist and bringing those sensibilities to the public arena may take on a variety of unique properties. This is because, while the national survey data referenced above suggests that American Muslims are concerned about Islamic extremism in the United States, it is not clear from these data what this actually means in terms of individual Muslims coming to a personal resolution of how they ought to live their lives as Americans, and bring Islam to the public consciousness in the process.

In keeping with the definition of fundamentalism in this chapter as pertaining to the reinterpretation of jihad into a personal, rather than a collective, duty, one of the best ways to understand the intersection of Muslim fundamentalism and Muslim life in America is to focus on the degree to which group participants seek to live out Islam's five pillars in their daily lives. As we will see, this approach provided a rich framework from which to understand Muslim fundamentalism and American politics.

One of the first questions asked of participants regarded the routineness of their religious rituals. Overall, participants noted that they attempted to follow their *salat* obligations on a regular basis. However, the informal pressures they encountered while doing so were substantial. As one participant stated

> I was not looking to make things difficult for my employer. I went aside with him one day and explained my circumstances. He seemed cooperative. Then, I started hearing people make comments as I headed to the break room for prayers. On the one hand, I was not surprised. I would say that I prepared for it a long while. But it still sent a shock through me when they said things. Little things. Nothing too strong, maybe just a smirk. Maybe I was looking for them to make my prayer an issue, so I saw more into their actions than what was intended. The point is that while I was able to pray at work, I found myself becoming more hesitant to discuss my faith with others. It sounds crazy, but even if someone wanted to just discuss what is happening in the world, and the talk turned to anything in the Middle East or about terrorism, or even just

> about personal faith, I got really uncomfortable. I just decided to avoid being a Muslim in every way but prayer, which I could not abandon for the sake of my soul. Yet I felt like I was not going to be able to truly be myself—a Muslim—with these people.

Work was not the only place where *salat* was made, at best, a complicated issue for participants. As one college student participant expressed

> There is trouble making people understand why I was doing this. We go to lunch, but I would then need to be excused . When we all go together [as fellow Muslims], there is no problem. When we have Christians and others with us, they don't know why we can't pray later.

Importantly, none of the participants reported any incident in which they were verbally or physically threatened for carrying out *salat*. Instead, most related that they sensed their actions were constantly on display for those in the community—as if they were special attractions. It is here where the smallness of Springfield's Muslim population appears to have a tremendous impact. In larger Muslim communities, there is likely a greater level of insularity that affords Muslims the opportunity to carry out their religious obligations in the comfort of a more robust community. However, if the non-Muslims the participants encountered were simply inquiring as to Muslim practice, it is likely that the group participants would have felt some degree of angst. This is important to keep in mind throughout the rest of the chapter, particularly because the pressures exerted from non-Muslims may, in fact, be comprised of the perceptions of Muslims themselves.

Perhaps because of the undesirability of admitting a diminishing of religious observance, none of the participants suggested that they ever stopped making *salat*, despite the difficulty they reported in some instances. Hence, along this dimension, it looks as though the living out of jihad was not affected. The same is generally not the case for *shahada*, which is another of the five pillars of Islam, and one that requires the profession of one's faith in Allah and his prophet Mohammed. It is understandable that, based on their experiences with *salat*, participants would be hesitant to publicly proclaim this basic tenet of their faith. Evidence from the focus groups corroborates this expectation. As one participant offered

> I would not talk about that [Allah and Mohammed] with anyone outside of my group of Muslim friends. Actually, I would talk about it, but I wouldn't say that the other religions are wrong. I'm scared of what would come

When asked whether they believed that they have a primary responsibility to advance Islam and its principles in the world, all participants answered in the affirmative. It was here that I brought up the views advanced by Maududi and Qutb, and inquired as to whether the group members saw the theorists' understanding of what an Islamic democracy might look like as a realistic possibility for development in the United States. I was surprised by some of the responses. As one participant eloquently stated:

> Yes, I believe in the values of Islam. We have much to share with America. All of it fits with the "American ideal," if you can say that's what it is. These are Islamic truths, at the end of everything, and I believe that we have the truth. I am excited by the thought of making the world a better place, but, and I can't speak for the rest of the people here, but I think we are taught to think twice about asserting ourselves as Muslims here. I don't just mean in Springfield, but in the entire country, although Springfield is a difficult place to be Muslim, no question. I think that we always are on guard that we can never even think about making the kind of system the thinkers you just mentioned were advocating for. We just want to survive, but, on the other hand, I guess we need to be honest—all of us—are failing to live up to our responsibilities as faithful Muslims. I mean, if we can't bring our faith out, how can we look ourselves in the mirror?

Interestingly, this participant's statement brought the only discernable occasion of conflict during the sessions. By apparently taking her fellow Muslims to task for what each apparently felt was part of their identity as followers of Allah, but was difficult to do because of their immediate surroundings, several participants spoke up and asked what the first speaker would do in the face of persecution for advocating anything remotely sounding like an Islamic political system in the United States. It was at this juncture that the predicament the participants find themselves in becomes clear.

On the one hand, no one in the group found it desirable to argue that the basic expectations of jihad should be modified to ease the responsibility of advancing the Islamic faith, including a political system based on its principles. Yet, on the other hand, no one wished to publicly take on the daily sacrifice of being a martyr in their regular activities in work or school by advocating political and religious views that they knew (or at least anticipated) would open them up to retaliation. Of course, American Muslims have good reason to be wary of the response they might receive for these types of actions, not only from private citizens, but from government law enforcement agencies.

The result is an intellectual and religious quagmire for these believers. Their religious identity is set and, from all outward indications, absolute. However, and as I suspected when beginning this investigation, Muslim behavior in living out this identity is constrained, perhaps by perception, perhaps by reality in terms of anticipating negative consequences from their community. Regardless, it is abundantly clear through this focus group exercise that the truly difficult work is not imagining a Muslim political system from a theorist's perspective, but living with the personal consequences of having to hedge one's bets fulfilling a personal commitment to practice one's faith according to a fundamental set of behaviors and beliefs.

One option that I asked the participants to reflect on was what one might call a strategic choice to speak out in favor of those Islamic values that might be seen as quite similar to (and arguably part of) Springfield's dominant religion—Christianity. The group members did not seem at ease with this possibility, perhaps because their fundamental understanding of *shahada* means that Islam itself is proclaimed as the truth—invariably at the expense of other faith's claiming the same mantle.

The deeper problem with this approach is that it places Islam on the road to assimilation with the dominant faith in a particular area. In doing so, the dignity of individual Muslims may be preserved, but, arguably, at the cost of fulfilling their fundamental commitment to jihad, especially in terms of *shahada*. This explanation is confirmed by evidence from the group participants that they cannot live out their religious identities with the same degree of integrity other American Muslims do, especially if those Muslims live in larger religious subcommunities. In the words of one:

> I think we [Muslims] face tough things. But it just has to be so much harder here [in Springfield]. Look, I only really know the people in this group, and these are my closest friends. The people you have here are basically the Muslims in the town. That's it. We don't have enough people to even fill the space we have for the Islamic center, and we already went to get the smallest building we could find. It all makes you think before you speak. I have family in Houston, and there is none of the problems there we have here. They can go out into groups that are really groups—crowds—of fellow Muslims. It makes you less scared. That's good, but we don't have it here [in Springfield]. Do you really think we will start talking about our beliefs when we know that no one will come to our defense. It makes things tough. We're looking for a way to make it work better, but we don't have any answers. This area is really closed off in so many ways that it makes me personally not want to even think about being Muslim sometimes.

If there is good news for these participants, it is that the remaining three pillars —*hajj* (pilgrimage to Mecca), *sawm* (fasting), and *zakat* (charitable giving)—are all activities that can occur outside of the public eye—and outside of the intense pressure that this participant suggested feeling. While this provides some relief to the tension participants report feeling about their lives in Springfield, it does not seem to go far enough in providing the kind of personal freedom most group participants say they yearn for. According to one:

> I want to live like anyone else here. It is my right, and I hope they let me have it. I like it here, but I always feel like I am losing part of myself being here. It's very difficult. I don't think I can be a true Muslim and a true person here.

This statement is telling because it points to the tension between living one's life within a very small Muslim community and attempting to enjoy one's life in the United States. Of course, all of the participants are in the United States by either choice or birth. As one might expect, those in the group who live in the country by choice are the college students who elected to attend college or university in Springfield. The non–college-attending participants are a mix between native and converted Muslims, all of whom say they have too many vocational and historical ties to the area to leave, despite the difficulties life in the area poses to living the Muslim faith.

In terms of how group participants see their political experience in Springfield, and America more generally, there are clear indications that tensions exist between living one's life according to the principles of jihad, and being as fully involved as possible in politics. This has direct implications not only for fulfilling *shahada*, but experimenting with the creation of a Muslim form of politics that reflects Maududi and Qutb's sentiments. To be clear, none of the group participants could recall a situation in which they were overtly made to feel as though they could not participate in American politics, and all those eligible to vote mentioned that they did so on a regular basis. Yet when asked, participants related that they did not feel a sense of belonging to the country—a psychological sense that they were actually part of a national community. According to one:

> I believe I am apart. We are different. No one says so to our faces, but I think it's something that goes with us. I have lived here for over 25 years, and I still sense that I am on the outside of something. I think I could figure out how to not feel this way, but I haven't yet. I just don't feel at ease.

There was corroboration in the group for this member's sentiment.

> Becoming "American", and I use the quotes on purpose, is a good thing for us as Muslims because we want to be part of the country and its people. But I do think we have a lot to sacrifice in saying to our friends and strangers—"hey, we're one of you," because we are not. Even though people are nice to us—they don't say things to make us feel strange—on the inside I think I know that I need to preserve my spirit and purify my actions to reflect Allah's will for my life. I love my [non-Muslim] friends, but I fear they will never understand that they live in world in which I cannot easily inhabit because American government has become so detached from a sense of the right and spiritual.

This participant did well in summarizing the key issue at hand. As the preceding discussion of an Islamic theory of democracy suggested, Islam will likely never be able to let go of the notion that the civil government must, in some basic way, reflect its principles (however defined). While there are certainly those in U.S.-based movements, such as the Christian right, who seek the creation of a religiously informed government (see Rozell's chapter in this volume), Christ's "render unto Caesar" statement in the Gospel of Mark opens the theological door for a separation of church and state in Christianity that Islam simply does not possess. Hence, there seems to always be residual tension between how far a government and society can go toward either secularism or religious pluralism without being at odds with Islam, and especially Qutb's view of an Islamic government. For Muslims, this delicate dance plays out in the daily decisions about how to act in pursuit of jihad, and how to simultaneously seek a quality life within the American political and legal system that begins the process of reflecting Islamic values.

That the Springfield participants do not appear to match findings from the national surveys in reporting instances of political or physical discrimination may be due to a number of factors, not the least of which is the relatively small number of Muslims involved in the focus groups, and the open-ended nature of the focus group sessions. That said, there may be something to the notion that Muslims face different sets of constraints when living in an area with few coreligionists. The responses to this point suggest that, rather than being singled out by the larger population and cast as an out-group in any kind of tangible way, Springfield Muslims do not exist in a large enough number to constitute the kind of threat to local traditions and expectations that more substantial Muslim communities

might represent in other communities. In other words, Springfield Muslims may be too small of a contingent to be noticed as an actual group or community. The interactions that Muslims have with non-Muslims at work, school, and other social settings may be considered in isolation by the wider community, with almost no larger association of the focus group members as a religious community made by the non-Muslims.

This might explain why the focus group participants had almost no negative things to say about their experiences with non-Muslims in Springfield, and had no specific examples of blatant religious or political discrimination to document. But this still does not address the essential tension group members expressed between being Muslim and being American in a place where they are so outnumbered, religiously speaking. If anything, the group data suggests that the struggle for balance between realizing one's obligations according to jihad and coming to terms with life in the American political system is largely an internal or psychological one. Indeed, the temptation for these Muslims might be to forget about their religious obligations altogether. It would certainly be easy to do so given (1) the small size of the Springfield Muslim community, which likely does not provide the kind of social network accountability found in larger Muslim communities, (2) the general areligious tenor of American politics in the twenty-first century.

The focus group Muslims were similar in their political positions to respondents in the national surveys, especially regarding their support of Obama, and their strong dislike of Bush Administration policies. Still, it is not clear what this means in terms of individual Muslims negotiating the call to jihad within American political society. For group members, there is likely no real way to break through the tension described here except to somehow come to some type of inner realization that they walk a fine line between fulfilling their spiritual duty and living in a society that does not place a premium on religious devoutness. One participant arguably said it best:

> I could pretend none of this matters, and that I am not a person of deep faith. But this is not who I am. And if you ask any Muslim, I believe you will find this is not how they see themselves. The solution to the question of how we live in the American world is to trust that Allah will guide us if we are faithful to Him.

This level of ambiguity may be understandable from the perspective of an individual trying to reconcile personal religious and political

identities, but what does it mean from the collective standpoint of American Muslims and an Islamic democracy? To my knowledge, no national survey of American Muslims has effectively captured the personal or collective struggle between one's call to jihad and partaking fully in the American political and legal systems from what might be termed a fully acknowledged Muslim identity—one that actively seeks to make the American political system either reflective of Muslim values or actually Islamic by some definition. In other words, rather than stifling the expression of their fundamentalist-based values, as much of the Springfield focus group appeared to do, a fully acknowledged Muslim identity in American politics would seek to bring the insights from Islamic democratic theory to life within the existing American political context.

Realistically, this is a very distant possibility at the present time. Though the ranks of Muslims electing to become involved in political activities are growing, the community represents arguably *the* quintessential out-group in American politics. As such, increased participation will likely promote greater recognition of Muslim political concerns, but the reimaging of American democracy according to something resembling an Islamic democracy is of another order. One might also suggest that the pluralistic nature of American political society makes the kind of transformation necessary to construct an Islamic political society unrealistic.

Still, what should be made of the theoretical musings offered by Maududi and Qutb? Do their sentiments ring true in the hearts and minds of American Muslims? Evidence from the focus group participants seems to suggest that they do. In the words of one:

> There is truly no separating Allah from government since Allah sustains all there is. This doesn't mean an Islamic government, whatever that means, but it says we must look to Allah for guidance and wisdom. We can't do this on our own. Respect for people—yes. People should enjoy religious freedom, but there must be some higher standard.

Yet even assuming that most American Muslims share this view, one is struck by the question of coordination. Specifically, how would such an undertaking even be envisaged? It is worth noting that none of the focus group participants reported feeling particularly close, or their interests represented, by national groups ostensibly acting on behalf of the Muslim community. In fact, and in what might again be an artifact of living in a community with so small a Muslim population, there appears to be a sense of disconnect much of group reports between organizations and movements that claim to represent Islam at the

national level, and their situation in southwestern Missouri. For while group participants were not willing to deny their personal responsibilities to jihad, there was no significant clamoring for a greater sense of Muslim group consciousness, even among the Springfield believers.

What one might conclude from this investigation, therefore, is that the intersection of Muslim fundamentalism and life as a participant in the American political and legal systems does not produce any sort of ostensible symptoms of conflict that are likely to bubble over into unrest, protest, or illegal behavior—as might be the case with other religious groups in other political systems. Instead, the meeting of personal religious commitment and the daily experiences of life in America appear to create a significant degree of personal—internal—conflict, perhaps bordering on turmoil, for which there is no immediate resolution.

Indeed, what fundamentalist Muslims appear to face in twenty-first century America is a personal question that has no discernable solution—how does one best live out the call to personal jihad in a manner that comports with the expectations of American law and politics? According to the focus group sample, subordination of at least some fundamentalist principles appears to be the answer, but this is more of a defensive reaction, hardly in keeping with what the Islamic theorists had it mind. Whether moving to some level of comfortable accommodation that can bring about greater degrees of personal religious expression among Muslims in communities like Springfield is a topic worthy of continued attention.

Notes

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3. Jan-Erik Lane and Hamadi Redissi, *Religion and Politics: Islam and Muslim Civilization, Second Edition* (Farnham, UK: Ashgate Publishing, 2009).
4. Calfano, Djupe, and Green, "Muslims and the American Presidency."
5. See data and analysis in Paul A. Djupe and John C. Green, "The Politics of American Muslims," in *From Pews to Polling Places: Faith*

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8. Ibid.
9. Brian Robert Calfano, Paul A. Djupe, and John C. Green, "Muslims and the 2008 Election," in *Righteousness and Justice: Barack Obama and the 2008 Presidential Election,* ed. Gaston Espinosa (New York: Columbia University Press, 2010).
10. Ibid.
11. Ibid.
12. Rosalind W. Gwynne, "Usama bin Laden, the Koran, and Jihad," *Religion* 36 (2006): 61–90; Rudolph Peters, *Jihad in Classical and Modern Islam: A Reader* (Princeton, NJ: Marcus Wiener, 1996); Lane and Redissi *Religion and Politics.*
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Chapter 7

Judaism: Religious Ritual as a Form of Boundary Maintenance

Hella Winston

In February of 2005, the *New York Daily News*[1] reported that a well-known ritual circumciser, or *mohel*, in the New York area was under suspicion for transmitting the herpes virus to infants during a circumcision ritual known as *metzitzah b'peh*, a practice that involves suctioning the blood from the circumcision wound directly by mouth. According to the article, city health officials had initiated an investigation of the mohel, Rabbi Yitzchok Fischer, in late 2004, after they became aware that three infants in the city who had tested positive for herpes that year had all been circumcised by him. One of the babies had died ten days after the circumcision, and the health status of the other two was, at the time the article was published, unknown. The article also noted that the "[t]he custom of metzitzah is thousands of years old. But experts said that these days, many mohels breathe in through a sterile tube to draw the blood instead of using their mouths directly on the wound, although in some ultra-Orthodox,[2] sects[3], the oral practice is mandatory."

According to court papers obtained by the *Daily News*, the city's Department of Health and Mental Hygiene requested that Fischer take a blood test and ordered him to stop performing oral suction until they got the results. However, after the Department received a report that Fischer was not complying with the order, it filed a legal complaint to compel him to do so, citing its concern "that the

possible transmission of herpes simplex virus type 1 in infants may be continuing as a result of defendant's practice of metzizah bi peh [*sic*] . . . Defendant's conduct to date constitutes a threat to the public health." Around the time the story broke, the state health department also issued a ban against Fischer but, according to an article in the *Forward*, withdrew it in April "after receiving a written assurance from a Hasidic business man, Jacob Spitzer, that the community was instituting its own self-policing procedures."[4]

While news reports continued to follow Fischer's story in particular, the practice of metzitzah b'peh itself quickly became the focus of both media and government attention. Dr. Thomas Frieden, the city's health commissioner, spoke out publicly against the practice in general, asserting that it poses "inherent risks" to newborns[5] because of their immature immune systems. His comments touched off a firestorm in the ultra-Orthodox community and ignited a battle that continued through the year and well into 2006, pitting ultra-Orthodox adherents of the practice against everyone from government officials and doctors to the rabbinic leadership of the Modern Orthodox Jewish community.[6] It also provoked a clash between the city and state's respective health agencies.

As the story unfolded, some journalists and observers framed the issue in terms of "cultural differences" and attributed the ultra-Orthodox community's strong negative reaction to Frieden's comments to a misunderstanding of oral herpes and its transmission.[7] As the battle raged on, however, it became clear that something else was at play. Indeed, while some ultra-Orthodox leaders did try to claim that there was insufficient medical evidence to deem unsafe what they insisted was "a ritual that has been performed safely, thousands of times a year, for thousands of years,"[8] most of the communal reaction focused on what was perceived to be unwarranted government intrusion into the community's "ancient" religious practices. Largely absent from the outcry were any expressions of sympathy or concern for the infected infants or their families.

In newspaper articles, open letters, blog posts, sermons, and (Yiddish) flyers posted in Hasidic neighborhoods, the city's health department was accused of transgressing its authority and infringing on the community's religious freedom and its rabbis' rights to regulate ritual practice. In passionate speeches to their congregations, some rabbis compared the health commissioner and the mayor—both secular Jews—to Nazis and Russian Czars,[9]branding them antireligious and arguing that their ultimate aim was to ban circumcision altogether, although the practice of circumcision was never itself at

issue. On February 18, 2005, an editorial in the ultra-Orthodox publication *Yated Ne'eman*[10] asked:

> Will we become like our Russian brethren in the past century who were forced under the Communists to conduct sacred bris [circumcision] in underground bunkers with sentries standing guard. Are we about to revisit those days in our own country?

While no attempt was in fact made by the city to ban circumcision—nor even the practice of metzitzah b'peh—in August of 2005 the city's health department did move to prohibit Fischer from performing the rite in the city, sending a draft of an order to cease and desist from the practice to his lawyer. Within days of that action, according to a story in *The Jewish Week*,[11] "[t]he city's 311 information and complaint line fielded a barrage of calls . . . from people from Brooklyn, Rockland County and even upstate New York to complain about government interference." One caller, Isaac Reisenfeld of Division Avenue in Williamsburg, asked " the Department of Health not to prohibit circumcision, as it is very necessary for the Orthodox Jews." Another anonymous caller said, "This is America, not Russia. The Department of Health should not mix into the religious process."

Leaders in the various communities did little to dispel these impressions—indeed, some reports indicate that they in fact fostered them—and used the communal reaction to press for intervention by the mayor. Bringing their concern that such a ban "would set a bad precedent,"[12] the leadership met with the mayor on August 11. According to a story in *The New York Times*[13] that featured a photo of the mayor with a roomful of bearded men in black coats and hats, Bloomberg concluded the meeting with a promise "to do a study, and make sure that everybody is safe and at the same time, it is not the government's business to tell people how to practice their religion."

After the meeting, Rabbi David Niederman of the United Jewish Organization in Williamsburg, Brooklyn, told the *Times* that "the Orthodox Jewish community will continue the practice that has been practiced for over 5,000 years." By October of 2005, the city had dropped its suit against Fischer and the health department had referred the matter to a *beit din*, or Jewish religious court, which it charged with investigating the practice.[14] The religious court was given until December 1 to make its recommendations to the city.

In December, however, it came to light that two more babies had been infected during metzitzah b'peh (though apparently not by Fischer). That, coupled with the fact that the religious court had

failed to deliver its findings to the city by the deadline,[15] prompted Frieden to issue an "Open Letter to the Jewish Community."[16] The purpose of the letter, Frieden wrote, was to "present information on what we currently know, to clear up misinformation, and to make clear that in the Department's view there is no reasonable doubt that the practice of *metzitzah b'peh* ('suction by mouth') has infected several infants in New York City with the herpes virus, including one child who died and another who has evidence of brain damage."

After presenting background on the Department's investigation into the issue and citations to the relevant medical literature, the letter recommended—but stopped short of requiring—a cessation of the practice altogether:

> [W]hile severe illness associated with this practice may be rare, because there is no proven way to reduce the risk of herpes infection posed by circumcision which includes *metzitzah b'peh*, the Health Department recommends that infants being circumcised not undergo *metzitzah b'peh*.

Notably, however, Frieden endorsed alternatives to the practice that are typically used in Modern Orthodox Jewish communities—whose rabbinic leadership had already issued its own public policy statement[17] recommending that mohels stop practicing oral suction and instead use safer methods. He then concluded his letter by offering reassurances that he had no plans to actually ban the procedure outright:

> While some religious authorities consider metzitzah b'peh the only acceptable way to draw blood away from the circumcision cut, others use different means. For example, a mohel may use a glass tube or a glass tube attached to a rubber bulb to suction the blood away from the baby's cut. Other mohelim use a sponge or sterile gauze pad to wipe the blood away. Unlike metzitzah b'peh, there is no evidence that any of these practices causes herpes infection.
>
> The Department has reviewed all of the evidence and there exists no reasonable doubt that metzitzah b'peh can and has caused neonatal herpes infection. We have always maintained that it is our preference for the religious community to address these issues itself as long as the public's health is protected. While some medical professionals and others in the Jewish community have called on the Department to completely ban metzitzah b'peh at this time, it is our opinion that educating the community through public health information and warnings is a more realistic approach.

Frieden's letter was met with renewed outrage by the ultra-Orthodox community, some of whose leaders accused the mayor of having

misled the community into believing it would be left alone to handle the issue "internally" in order to secure its votes for his reelection bid. And once again, the health department came under fire for what the community considered an overstepping of its bounds. For example, David Zwiebel, the executive vice president of Agudath Israel, an ultra-Orthodox umbrella group, told *The Jewish Week* that rather than advising parents to consult their mohel and pediatrician about the procedure "[the letter] probably would have been more respectful to have said 'consult your rabbi.' It's almost as if the Health Department didn't want to encourage people to speak to their rabbi and figure out with him their traditional regulations."[18] Asked by a well-regarded Jewish blogger for his reaction to the letter's assessment of the health risks posed by metzitzah b'peh, Zwiebel wrote:

> We neither accept nor reject that metzitzah b'peh is a health risk—we haven't been privy to the evidence on which the Health Department bases its claim. What we do know is what we hear (and what the Health Department has heard) from pediatricians who serve the communities where the practice is routinely performed: that any incidence of neonatal herpes after metzitzah b'peh is extremely rare, and that any incidence of serious harm is rarer still. . . . Given that testimony, and given the fact that we're talking about an essential religious practice, we feel it was inappropriate for the Health Department to issue this type of public warning.
>
> What level of demonstrated risk would justify such a public warning or a ban? Dunno, but I'd imagine that if that level of risk existed, the religious leaders of the community would beat the Health Department to the punch.

Other public responses also emphasized the primacy of rabbinic authority and "tradition" over government policies and medical evidence. A group calling itself Friends of Bris Milah wrote a letter to the editor of a Jewish newspaper in support of the practice, citing the written opinion (translated into English) of one of the most respected ultra-Orthodox legal decisors, Rabbi Yosef Shalom Elyashiv[19]:

> It has been clarified through prominent physicians in Eretz Yisroel [Israel] and in the Diaspora that Metzitzah Bepeh—which has been practiced in all generations—poses no medical risk to the newborn upon which Bris Milah has been performed. Boruch Hashem [Thank God], tens of thousands of our Jewish brethren fulfill this mitzvah [commandment] with joy and there have been no incidents of infection. It is therefore clear that all that has been said about the need to refrain from Metzitzah Bepeh . . . are hollow and empty statements and chalila to make the minutest changes in regards to Metzitzah Bepeh.

> However, if a Mohel has a blister in his mouth, then Metzitzah Bepeh should be done by another individual.

(It is important to note here that the medical literature indicates that an adult carrier of the virus can transmit it without having any signs of an outbreak himself.) The same group, according to a story in *The Jewish Week*[20], placed an ad in an ultra-Orthodox newspaper, urging parents

> to call a 24-hour hotline "to report any conversation initiated by doctors, hospitals and other professional caregivers" regarding the procedure known as metzitzah b'peh. Describing the plan as "a giant step leading to a ban" on the procedure, the hotline message asked callers to leave the names of any health professional making "negative statements . . . against our mesorah [tradition]" and specifics about what was said, where and when. The information will be used to prepare for "future action," the message said, raising the possibility of protests and pressure on specific caregivers.

The possibility of a communal protest even made it into a column in the *New York Times,*[21] which noted that some community leaders were "so infuriated by the city's educational efforts that some threatened to protest at the mayor's inauguration wearing yellow Stars of David." The columnist, however, expressed incredulity at the prospect:

> In other words, some Jewish New Yorkers were ready to display a symbol of Nazi persecution at City Hall because the health department issued advice to parents about a procedure than can kill babies. The would-be protesters restrained themselves, a welcome decision to those who might have been troubled to see anyone in 21st-century New York equating a letter from public health professionals to the horrors of the Holocaust.

No protests actually ensued, however. Instead, some ultra-Orthodox leaders embarked on an ultimately unsuccessful campaign to remove Frieden from working on the issue[22]. The city's health department, in the meantime, undertook an effort to add neonatal herpes to the list of diseases that doctors are required to report to the city upon diagnosis. For its part, the State Health Department reached its own agreement with Hasidic leaders in June of 2006.

According to a report in the *Forward,*[23] however, the protocol the state adopted was very similar to what Hasidic leaders had been proposing for months, and it involved taking measures that experts say have no impact on the transmission of the virus, including applying the anti-viral drug Valacyclovir on the circumcision wound and

rinsing the mohel's mouth with Listerine prior to the ritual (a practice that was apparently widespread well before the controversy erupted). Frieden expressed his own concerns about the protocol, which were summarized in the *Forward* story. They included:

> [t]he lack of certain better-proven prevention methods; an investigation procedure that "implies that a community can stipulate how to conduct an investigation and may be justified in not cooperating"; an "approach to culture and molecular analysis [that] has many fundamental problems"; and "that the children of parents for whom metzitzah b'peh is not considered religiously necessary may undergo this procedure without the knowledge and/or request of both parents, and this is not addressed by your protocol."

The *Forward* story also noted that the state's health commissioner, Antonina Novello, was a Republican who served as Surgeon General during the first Bush administration and was appointed New York State Health Commissioner in 1999 by Governor Pataki, "who later touted her as a 'strong candidate' to challenge Senator Hillary Clinton for re-election." The story also pointed out that "Pataki has been known for his extremely strong ties to the Orthodox community since his days as a state senator, when he represented heavily Orthodox Rockland County."

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Boundary Maintenance and the Ultra-Orthodox Community

The controversy surrounding metzitzah b'peh—and the way it played out—raises important questions about how to balance a commitment to religious freedom with legitimate concerns about public health. It also demonstrates the ways in which public policy can be influenced by the political power of groups that vote in blocs, at times to the detriment of public heath and safety. In addition to this, however, the dispute about metzitzah b'peh serves to illuminate one of the central problems faced by any insular community seeking to retain members and perpetuate itself within the mainstream society: maintaining both the physical and symbolic boundaries that separate it from the "outside world."

Aside from their specific religious beliefs and practices, one of the most salient features of ultra-Orthodox communities is their expressed commitment to remaining apart from the host society and what they

deem to be its "modern" values and practices (which, notably, they will invoke and exploit when it is to their advantage). However, it is precisely because these communities exist within the modern, pluralistic society they seek to reject that they must expend so much effort on defining and maintaining their boundaries. Of course, as Heilman[24] notes, "the aspects of life [the ultra-Orthodox] seem to emphasize and defend are determined in some measure by the world they see as opposing them. [The ultra-Orthodox] are inextricably linked to the ways of life they oppose. And those are always changing (p. 38)."

Ultra-Orthodox communities operate in many ways like "total institutions," a term coined by Erving Goffman[25] to describe institutions where all aspects of individuals' lives are subordinated to and dependant upon the authorities of the institution—who, in this case, are the rabbinic leaders. Because these communities tend to be geographically bounded, they can also be understood as enclaves, the defining relations for which, Sivan[26] notes, are "inside-outside," or relations between the enclave and what lies beyond its boundaries, rather than "upside-downside," meaning the relations between the hierarchy of social categories within the enclave community. It is Sivan's view that particularly when an enclave is created by "pull" (voluntary separation) rather than "push" (exclusion by the outside society), the main rewards it can offer its members are moral, rather than simply emotional, social, or even economic. As such, the enclave culture must stress the voluntary and specially chosen nature of its membership, minimize distinctions between members[27] while highlighting the value of each one, and place "the oppressive and morally defiled outside in sharp contrast to the community of virtuous insiders (p. 18)," thereby creating a symbolic—and in certain cases physical—"wall of virtue."

What then goes on within the confines of this wall? Sivan notes that behavior is paramount within enclaves, and that claims on time and space serve to "regiment and punctuate the cadence of members' lives (p. 32)" in a way that is markedly different from that of the host society. In the ultra-Orthodox case, dietary laws and Sabbath observance effectively bar members from interacting in certain ways, and at certain times, with those from the outside society. The dietary laws, requirements for daily prayer (for men) and ritual purification (for women), as well as restrictions on travel during the Sabbath, serve to reinforce the enclave character of these communities, as they make it necessary for members to live in physical proximity to places of worship, ritual baths, kosher butchers, and, of course, one another.

In addition to their religious practices, the ultra-Orthodox also separate themselves from the surrounding culture symbolically,

through their distinctive style of dress, their gender practices and, among the Hasidim, their use of Yiddish. Indeed, all strictly Orthodox Jews emphasize styles of dress, both as a way to link themselves to previous generations and to separate themselves not only from non-Jews, but also from contemporary Jews who identify with other (and the implication here is less "authentic") forms of Judaism or who are "secular." The following is an editorial written in an ultra-Orthodox paper, which makes this point quite clearly:

> The size of our lapels may change, even the style of our eyeglasses, but there are certain defining articles that link us to an ideology. That ideology includes a commitment to a generation that dedicated their lives to the concept of yeshiva education and the adherence to the directives of gedolei Yisroel. One of these signature articles of clothing, if not the most distinguishable one, has been the fedora-style hat. The black hat. It is what marks a ben Torah, and distinguishes him from all other segments of Jewish society. From the time President John F. Kennedy shucked his fedora at his 1960 inauguration ceremony and replaced it with the new look of freedom, the black hat assumed a heightened significance in society at large. It is the declaration that we still cling to the old generation; we still embrace the old values that we were taught and are not embarrassed to be called "old-fashioned black hatters." Indeed, we are proud to be known that way. Wherever we go, we wear our hats. They identify us as members of the Torah community. Others may vilify and deride us. But our hats remain a badge of pride and many of us don't remove them even when we go places where the hat—and we, ourselves—are not especially welcome.[28]

Further, the ultra-Orthodox rejection of most aspects of secular culture as "corrupt" and "defiling"[29] (see Heilman, 1992) also serves to create not only a symbolic boundary between them and the outside world, but also helps to define and reinforce physical boundaries as well: by officially prohibiting all but absolutely necessary involvement with most secular cultural practices, products, and people, the ultra-Orthodox render physically "off limits" many of those spaces (e.g., movie theaters, bars, museums, libraries, non-kosher restaurants, etc.) in which secular culture is produced and expressed. This rejection of secular cultural practices and products is often manifest through warnings or bans issued by rabbis and community watchdogs, which are typically published (in community newspapers and on fliers) and posted or circulated throughout the community.

While their distinctive religious and social practices serve to create clear boundaries between the ultra-Orthodox and the surrounding

society, they also function as a kind of performance of members' commitment to the community itself. Any deviation from behavioral expectations or norms becomes cause for suspicion within the community about the strength or seriousness of one's commitment not only to God and the tenets of the religion, but also to the community and its way of life. Related to this emphasis on the performative nature of practice, Helmreich and others[30] have also noted the effect on community cohesiveness of introducing new restrictions into the community. Discovering new, potential violations of Jewish law represents a form of "boundary work," as so doing allows community members to reinforce and emphasize shared common values, as well as demonstrate their own adherence to the tenets of their faith while separating themselves from their non-ultra-Orthodox co-religionists. While community members who do not recognize these new "discoveries" as valid may be branded "irreligious," such discoveries are also used to draw clearer boundaries around the ultra-Orthodox community and mark its separation from the Modern Orthodox community, whose members do not adopt them.

Boundary Maintenance and Metzitzah B'Peh

In light of the above it becomes possible to understand the controversy surrounding the practice of metzitzah b'peh not exclusively or primarily as a demonstration of the ultra-Orthodox community's ignorance of medicine, but as a battle to defend the community's boundary by reinforcing the authority of its rabbis against that of government or secular officials or experts. In fact, one of the most troubling aspects of this issue to outsiders is the fact that any community would disregard what most of us would consider legitimate medical evidence that a specific practice poses serious risks to human life. As such, for most people, the only plausible explanation that comes to mind is an ignorance of medicine, and it was from this assumption that the health department (and other medical experts) was operating. The fact that the health department's attempts to ban the mohel from practicing this ritual and to educate the public about its dangers produced the reaction it did, however, demonstrates the vast gulf between the priorities of the secular and ultra-Orthodox communities.

Despite Judaism's emphasis on safeguarding health and preserving life, the ability of these communities to maintain control of their distinct religious and cultural practices, and also to keep the outside world at bay, can trump even the concern for the health of individuals—as long as the risks are perceived to be "rare" (which,

in this case, even the health department noted they were). For the rabbinic leaders to allow—or, perhaps more important, appear to be allowing—the government, or doctors, to determine ritual practice would be to compromise their authority and ultimately erode the symbolic boundary separating the ultra-Orthodox community from the "corrupt" and "defiling" secular society.

Further, by accepting the government's suggestions, the ultra-Orthodox rabbinate would de facto be endorsing practices employed by the Modern Orthodox, something that would necessarily blur the line between the two groups and call into question the authority of the former. And, with its commitment to synthesize observance of Jewish law and traditional values with an engagement with the secular, modern world, Modern Orthodoxy represents a potent threat to the ultra-Orthodox way of life, presenting a viable alternative to the latter's strict segregation from secular society. To adopt oral suction practices used by the Modern Orthodox would represent not only a concession of ultra-Orthodox rabbinic authority to their "competitors," but an acknowledgement of the validity of at least some Modern Orthodox practices. In light of these concerns, the fact that some rabbinic leaders clearly misled the community about the known risks of metzitzah b'peh makes better sense. That the health of some of the community's most vulnerable members became a casualty of these concerns begs many questions, both about the ethics of the community and of the secular government.

Of course, one wonders whether the various government agencies involved would have taken a more forceful stance against the practice if the community in question had not been so politically powerful. Indeed, the fact that it ultimately allowed the ultra-Orthodox to "police" themselves on this issue only highlights how a community's boundary maintenance efforts can be aided and reinforced by those outside its borders. In this case, of course, it would be easy to say that the risks are confined only to the community and if the community is willing bear those risks, so be it. However, because the casualties here were infants, literally days old, it is a much more difficult argument to make. And, tragically, it is unlikely that any answers will be forthcoming unless many more children are harmed.

NOTES

1. Maggie Haberman, "Fear Rabbi Gave Tots Herpes Probe Death of Baby after Circumcision," *New York Daily News* (February 2, 2005).
2. Ultra-Orthodox is a (controversial) term used to describe those Orthodox Jews who not only adhere to a strict interpretation and

application of Jewish law, but also seek to maintain their separation from mainstream society, including other types of Jews. The ultra-Orthodox are distinct from Modern Orthodox Jews as the latter attempt to synthesize traditional observance and values with secular, modern principles and practices.

3. Ultra-Orthodox Jews can be divided, roughly, into two groups: the Hasidim and the Misnagdim (also known as "litvish," or "yeshivish" Jews). The practice of oral suction is mandatory within the Hasidic world, though not among the Misnagdim or litvish Jews.
4. Steven I. Weiss, "Doctors Say Circumcision Ritual Still Not Safe," *The Forward* (December 15, 2006).
5. Maggie Haberman, "Circumcision Rite Poses 'Inherent Risks,' City Sez," *Daily News* (February 3, 2005).
6. Modern Orthodoxy is a formal movement within Orthodox Judaism, whose adherents are characterized by the commitment to observing Jewish law while maintaining full engagement with secular society and modern forms of knowledge. Modern Orthodoxy places a high value on secular education and supports equal education for males and females. A commitment to Zionism as a political movement is also a central tenet of Modern Orthodoxy.
7. Debra Nussbaum Cohen, "Culture Clash Over Brit Ritual," *Jewish Week* (February 3, 2006).
8. See http://www.buzzle.com/editorials/2-6-2006-88203.asp
9. Personal communication.
10. Eric J. Greenberg, "Following Baby's Death, Orthodox Group Urges Followers to Drop Disputed Ritual," *The Forward* (March 4, 2005).
11. Nussbaum Cohen, "Culture Clash Over Brit Ritual."
12. Maggie Haberman, "Mike Caught in Row Over Rabbi's Herpes," *Daily News* (August 12, 2005).
13. Andy Newman, "City Questions Circumcision Ritual After Baby Dies," *New York Times* (August 26, 2005).
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15. Steve Lieberman, "NYC warns against oral circumcisions," *The Journal-News* (Saturday, December 17, 2005).
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Chapter 8

Mormonism: Harm, Human Rights, and the Criminalization of Fundamentalist Mormon Polygamy*

Stephen A. Kent

With the Utah conviction (eventually overturned) of fundamentalist Mormon[1] leader Warren Jeffs on two counts of rape as an accomplice,[2] and quashed indictments in British Columbia against two fundamentalist leaders (James Oler and Winston Blackmore) for allegedly practicing polygamy,[3] heated legal and social debates are occurring over what societies' responses should be to polygamy[4] in general and its fundamentalist Mormon version in particular. Child welfare is the most sensitive concern around polygamy issues, and this concern was at the center of the decision by officials in Texas's Department of Family and Protective Services to coordinate with law enforcement in raiding the fundamentalist Mormons' Yearning for Zion Ranch near Eldorado on April 3, 2008.[5] A raft of other controversial issues exist, however, around the practice, related to sexual, physical, medical, educational, and emotional abuse as well as financial malfeasance. Moreover, polygamy is a felony in both the United States and Canada, practiced (according to various accounts) by anywhere between 21,000 to 100,000 fundamentalist Mormon polygamists in the two countries (with additional practitioners in Mexico).[6]

I agree with the position that polygamy should remain a criminal, prosecutable offense in both countries, partly because of the widespread impact that the practice frequently has upon the human rights of children and the health and welfare of many people who live under its control. Specifically, I discuss the potential of harm to the health and welfare of girls and young women; the high occurrence of incest; the issue of infant deaths and genetic deformities; and the human rights issues related to the frequent fundamentalist Mormon practice of arranged marriages. In addition, polygamy typically displaces young men in polygamous communities, and often these communities rely upon welfare fraud and state support in order to operate. The state, in turn, has vested legal interests in maintaining monogamous marriages as legal entities, and the authoritarian, theocratic operation of polygamous communities threatens the rights of citizens within pluralistic, democratic states like the United States and Canada.

Although I realize that the particulars of polygamous practice vary to some degree between the groups themselves and the historical periods in which they have operated, these variations do not mitigate the detrimental impact that the practice has on many of the persons who live under its influence and on the North American societies in which it operates. Consequently, while others and I applaud efforts by Arizona and Utah officials to prosecute serious financial and sexual abuses associated with the practice (and sometimes along with them, bigamy and polygamy itself),[7] these prosecutions unevenly address other, serious, human rights violations that routinely occur in polygamous settings.

In the United States, all polygamists have lost their cases in court when attempting to defend their practice by arguing that the Supreme Court's *Reynolds v. United States* decision in 1878/1879[8] should be overturned. This decision affirmed the conviction of the prominent Mormon George Reynolds[9] for his polygamous practice, and after 130 years, it remains a good law that courts still cite.[10] While critics are correct to say that Chief Justice Morrison Waite did not identify the harms caused by polygamy,[11] abundant evidence now exists about significant personal and social damage caused by the practice. One can be a critic, however, of the Reynolds decision on any number of grounds but still conclude (as did attorney and author Elijah L. Milne), that "today there are many legitimate reasons for upholding the substance of federal and state anti-polygamy laws."[12] Many of these reasons involve harms that constitute serious human rights violations.

1. Girls, Young Women, and Pregnancy-Related Problems

While numerous and serious medical conditions can impact pregnant women and their fetuses and babies, the risk of these conditions increases due to mothers' young ages. Since many of the fundamentalist groups have histories of young brides (an issue to which I will return shortly), pregnancies among teenaged girls is common. These pregnancies are risky, however, since young women "are more likely than older women to suffer from severe anemia, pregnancy-induced hypertension, and delivery complications. . . ."[13] More seriously, "pregnant girls less than 15 years of age have a 60 percent higher maternal mortality rate than older mothers."[14] Without, however, any studies conducted on youth pregnancies among fundamentalist Mormon polygamists, we simply do not know if, or how, teens may have suffered from pregnancies.

We do know, however, that in the Fundamentalist Church of Latter Day Saints (FLDS) Texas ranch, "two girls were 12 when married; three were 13; two were 14; and five girls were fifteen when married. Seven of these [twelve] girls have had one or more children after marriage."[15] We also know that, in 1992, fifteen-year-old Kingston clan member, Andrea Johnson, was almost five months pregnant when she developed preeclampsia—a highly treatable but potentially deadly condition involving high blood pressure, swelling, possible seizures, organ damage (particularly to the brain, kidneys, and liver), visual problems, respiratory distress, etc.[16] Her young age was a risk factor, as was a family history (two of her sisters had developed it while pregnant).[17] Doctors performed a Caesarean section in an attempt to save the mother and fetus, but she died and her son has cerebral palsy—almost certainly caused by his premature birth.[18] (Her preeclampsia had developed into eclampsia [which can involve hypertension and related damage, multi-organ failure, and seizures], which killed her.) As a general statement about human rights violations of children that certainly fits this tragedy, "child marriage often ends in avoidable maternal death."[19]

A sister speculated that no one took Johnson to the hospital earlier because she had been married to her half-brother (incest is commonplace within this polygamous group), and the group did not want authorities to learn of it.[20] Controversially, however, after the mother died giving birth to the boy, the state let him stay with his father, who (six years later) was married to his own niece (which, as incest, was a third degree felony). An official from the Department of Child and Family Services said that "the child is well cared for, even though the

family has not complied with state laws requiring that the boy be in school or that he be granted a home-school exemption."[21] An attorney, however, whose actions had brought about much-needed reform to the state's child-protective services, charged, "[A] child living in an incestuous household is tantamount to child abuse."[22] It remains to be seen whether Utah Attorney General Mark Shurtleff is correct when he expressed his belief that "the practice of so-called 'child-bride' marriages within polygamous societies has been halted" in his state.[23]

2. INCEST

Incest (defined here as "sexual union with a near relative"[24]) is a widespread problem in these groups, which dates back to the earliest days of Mormonism.[25] The likelihood of incest increases with family size, social isolation, and rural location[26]—all of which are factors that describe most contemporary polygamous communities. In the contemporary period, reports of incest are widespread, and come from several polygamous groups.[27]

For example, a member of the Kingstons belt-beat his daughter (Mary Ann Kingston) for fleeing an arranged marriage to his brother (his daughter's uncle), and in 1999 a Utah court convicted that father of third-degree felony child abuse for his actions.[28] A jury found the uncle "guilty of one count of incest and one of unlawful sexual contact with a minor," and he received up to a ten-year sentence.[29] Three years later (in 2002), independent polygamist Thomas Arthur Green was convicted of "rape of a child" for having "'spiritually married'" his stepdaughter Linda Kunz when she was thirteen, and then having a child with her "four months after her fourteenth birthday"—a conviction upheld by the Supreme Court of Utah.[30] Writing about her own convoluted family relationships, Canadian Debbie Palmer (who grew up in Bountiful, British Columbia) explained:

> Several of my stepsons were assigned to marry my sisters, so I also became a sister-in-law to my own stepchildren. After my mother's father was assigned to marry one of my second husband's daughters as a second wife, I became my own great-grandmother. The step-daughter became my step-grandmother and I her step-mother, so when I gave birth to two sons with her father, my own sons became my great-uncles and I was their great-great-grandmother.[31]

Given these complex, incestuous entanglements, no wonder genetic disorders are a growing problem.

3. Infant Deaths, Genetic Disorders, and Graveyards

More troubling is the fact that the FLDS has its own graveyards. According to former-member-turned-critic, Flora Jessop:

> [Anti-polygamy critic] Linda Walker and I went out to the two cemeteries in the twin towns [of Hildale and Colorado City]—one was called Babyland, because it was just for babies. In those two graveyards we found 324 marked graves for children under eighteen years of age. Fifty-eight babies were buried in unmarked graves.[32]

A similar graveyard exists within the Allreds, or the Apostolic United Brethren. Based upon field work that began in 1989 and extended over half-a-decade, Janet Bennion reported:

> Over the years, I have heard of at least seven children who died during childbirth. Two additional cases of infant death were from internal deformities during the first year of life. Deaths such as these are rarely spoken of public[ly], and often, in the cases of death at childbirth, the infants are quickly buried in the Harker graveyard without ceremony. No official records of births or deaths are kept.[33]

As in other polygamist groups, in the Apostolic United Brethren "[c]o-wives are commonly related to each other by blood (sister, cousin, niece, aunt, etc.) prior to their marriage to the same man."[34] Because of the intermarriage within (and occasionally among) these groups, it is highly likely that many of these infant deaths are from genetically related illnesses.[35] Among the most debilitating and fatal is fumarase deficiency, which pervades the FLDS community, probably the Kingstons and the Allreds and possibly Thomas Green's polygamous family.

The effects of this deficiency are tragic—seizures, water replacing large areas of brain matter, mental retardation, severe mobility problems (including the inability to sit), severe speech impediments, frequently early deaths, etc.[36] "By the late 1990s . . . , fumarase deficiency was occurring in the greatest concentration in the world among the fundamentalist Mormon polygamists of northern Arizona and southern Utah. Of even greater concern was the fact that the recessive gene that triggers the disease was rapidly spreading to thousands of individuals living in the community because of decades of inbreeding."[37] As of early February 2006, there were twenty diagnosed cases in the FLDS community,[38] but "experts say the number of children afflicted in the FLDS community is expected to steadily increase as a

result of decades of inbreeding between two of the polygamous sect's founding families—the Barlows and the Jessops."[39]

Similar, and equally tragic, birth defects appear within the Kingston clan. "Among the polygamous Kingstons, a number of children have been born with birth defects, among them one born with two vaginas and two uteruses but not vaginal or bowel openings. Outwardly, she appeared to have no sex organs."[40] Other birth defects that likely contain a genetic component include preeclampsia, children born without fingernails, dwarfism, microcephaly, blindness, spina bifida, Down syndrome, kidney disease, and abnormal leg and arm joints.[41] One of Thomas Green's wives came from Colorado City, and a child of theirs suffers from a brain disorder named lissencephaly.[42] In sum, the incestuous practices of at least two FLDS communities are killing children, and condemning others to severely damaged and grossly debilitating lives.[43]

4. Arranged Marriages

A frequent theme in girls' and women's marriage accounts is that leaders of their respective groups have arranged them, often with little or no input from one or both parties or their parents themselves.[44] Leaders reward men's loyalty by assigning them brides, especially young brides.[45] The religious motivation for having three wives is that, after death, this number supposedly will allow men to pass to the highest level of heaven and become gods themselves. Children, therefore, reputedly are souls beginning their godly journeys.[46] Some nonfundamentalist women do convert into the practice,[47] but a large number of brides presumably come from within each respective group (or sometimes from a related group). A small sample study from an anonymous polygamous group indicated that "husbands and first wives are young and relatively close in age when they marry," but "the gap between husbands' and wives' ages increases, with new wives in their 20s, on average, and the husband's age extending from the 20s to 30s to 40s and beyond."[48]

Two consequences result from the demand for young brides as the men age. First, because the men are aware of competitors who also are attempting to get young brides, they target younger and younger girls in order to "celestially marry" them before someone else does. Second, the older men must eliminate the competition for those young brides—the unmarried boys and young men who are roughly the same ages as the targeted females.[49] Both of these consequences raise serious issues involving human rights abuses.

Arranged marriages for women of any age involve human rights violations, according to the 1979 *Convention on the Elimination of All*

Forms of Discrimination Against Women. Article 16 of that convention calls for women to have the same rights as men to enter into marriage and "freely to choose a spouse and to enter into marriage only with their free and full consent."[50] Specifically involving underage girls, the same article in Convention pronounces, "The betrothal and the marriage of a child shall have no legal effect and all necessary action, including legislation, shall be taken to specify a minimum age for marriage as to make the regulation of marriages in an official registry compulsory. . . ."[51]

5. Displaced Young Men—"The Lost Boys"

Regarding the second consequence of polygamy—the pressure to eliminate male competition for young brides (sometimes called the surplus males issue)—the FLDS group has expelled hundreds of teens and young men from its communities, while others simply left. Estimates range from 400 to a thousand young men fled or suffered expulsion during a five-to-six-year period in the first years of this century.[52] Sometimes families even dropped off their banished sons in southern Utah and Arizona towns, forcing them to fend for themselves, despite the fact that they likely had not finished high school, had limited skills (perhaps concentrated in the construction trades), little money, and extremely limited experience with the outside world. Alternatively, for the males whom FLDS leaders did not want to lose or who could provide needed labor for member-owned businesses, these leaders sent untold numbers of boys and young men to a "reform retreat" comprising manual labor and church teachings in Colorado City.[53] Leaders sent other young men to the FLDS community in British Columbia, where Winston Blackmore put them to work in his or other polygamists' logging-related businesses.[54] They worked for lower than minimum wages in harsh working conditions that often were dangerous and resulted in injuries.[55] Similarly, the working conditions in Colorado City/Hildale were equally dangerous, involving the illegal use of minors and minors using power tools.[56] "In one case, four underage boys employed by a Colorado City company suffered broken hips, knees, and head injuries after falling off a church roof while working in Utah."[57] One autobiographer reported, "I would later see kids come back from Canada either broken or cowed, the spark gone from them—or so rebellious that they left the church at once."[58]

Less information exists about working conditions within Kingston clan businesses, but what little there is suggests that significant labor issues involving pay and safety exist for the young men (and for that matter, the young girls and the adults) who work for some

of these companies. In an extensive 1998 investigation of the history and business dealings of this group, *Salt Lake Tribune* reporter Greg Burton wrote about its financial empire:

> Profits were extracted from young laborers and the sacrifice of the many Kingston wives living in squalor with scores of children, say ex-members and former state investigators.
>
> "The children are rather sheltered and kept out of the mainstream of society and at a young age enlisted to work for a Kingston company," said a Utah welfare fraud investigator. "They got their needs met, food and clothing and things were given to them, but often times the food . . . was produce and meat out of their stores that could not be sold. Expired food was the mainstay of how they were living."[59]

Some thirteen years earlier, an article in the *Wall Street Journal* indicated:

> Many [members] work at clan enterprises for a fraction of the wages that similar work elsewhere would pay. A staple of their diets is wheat sprouts, which they call "grass." But groups of clan members also go around to supermarket dumpsters to collect discarded produce.[60]

Finally, a 1998 editorial in the *Salt Lake Tribune* mentioned that many "children, especially girls . . . are made to work long days in family business, often paid in scrip to be redeemed only in family-owned enterprises."[61] Safety information exists about one of the companies, a garbage disposal company that a Kingston family member owned called A-1 Disposal, and between 1993 and 1998, "A-1 Disposal has been cited for 245 state and federal safety violations and paid $15,000 in fines to the Utah Department of Transportation."[62] Every indication, therefore, is that many young men and women work in Kingston clan businesses from their teenage years onward, often in dangerous conditions for very low wages and poor benefits (which may include substandard food).

Beyond any local or federal laws that these groups may be breaking regarding their teen and adult workers, basic issues of human rights are at stake. The United Nations' *International Covenant on Economic, Social and Cultural Rights*, which entered into force in 1976, recognizes:

> the right of everyone to the enjoyment or just and favourable conditions of work which ensure, in particular: (a) remuneration which provides all workers, as a minimum, with (i) Fair wages . . . ; [including] (ii) A decent living for themselves and their families . . . ; (b) Safe and

> healthy working conditions . . . ; [and] (d) Rest, leisure, and reasonable limitation of working hours. . . .[63]

Without having documentation on the working conditions for teens and adults in other groups, we at least can conclude that labor exploitation is a common factor in two of the large polygamous organizations, likely affecting the lives of thousands of its members. Moreover, the substandard wages and inadequate investments in safety that characterize these polygamous companies undercut secular competitors whose job-bids necessarily reflect adherence to secular laws.[64] The numerous problems surrounding the lost boys are direct results of communities' attempts to maintain polygamy as a fundamental practice.

6. Welfare Fraud and Dependence on the State

Claims of poverty cannot explain fully the widespread pattern of fraud and state financial dependence and exploitation that pervades many of these polygamous groups, especially because some exposed cases involve groups that were quite financially well-off. What may explain these cases is an attitude toward outsiders that first developed in early Mormonism and seems to have carried over within the contemporary polygamous sects.[65] Early ex-Mormon critic, Fanny Stenhouse, reported that the Mormon leaders of her era believed that the Latter-day Saints were the people of God to whom He had given "all the wealth and substance of the earth, and therefore it was no sin for them to help themselves—they were but taking their own. To over-reach or defraud their enemies was facetiously called by the Mormons 'milking the Gentiles.'"[66] Contemporary polygamists call similar actions "bleeding the Beast."[67]

In what now seems to have been an example of bleeding the Beast, Utah welfare workers in the early-to-mid-1980s uncovered a massive fraud case involving the Kingstons. They discovered that "at least four wives and 29 children of Mr. [John Ortell] Kingston collected hundreds of thousands of dollars in public assistance over ten years, even though Mr. Kingston was easily capable of supporting them." He was "a multimillionaire who controls a $70 million polygamy-based business empire reaching into five states."[68] In "the biggest single recovery of child support ever made in the U.S.," Kingston repaid the Utah government $250,000, and also "agreed to repay welfare benefits given in behalf of children of at least three other clan women."[69] While John Ortell Kingston avoided prison by his repayments, two others in his group were not so lucky. Joseph Fred Kingston pled guilty to criminal nonsupport, and one of his plural wives,

Lynette D. Taylor, pled guilty to theft by deception. Both received year-long prison sentences, but she obtained early release in order to care for her two severely handicapped children.[70]

Another fraud case involved Thomas Green, who in August 2001 (the year before his child rape conviction) a Utah judge convicted of four counts of bigamy and one count of criminal nonsupport.[71] Because of the latter conviction, the court ordered him "to pay $78,868 in restitution to the state for welfare payments for his minor children, 25 of whom still live with him."[72] Green had been avoiding his financial obligations to his children, letting welfare cover their costs.

Through the late 1990s:

> The southern Utah town of Hildale, for instance, has one of the highest welfare participation rates in the west. Residents there, and in the next-door town of Colorado City, Ariz[ona], have enjoyed government subsidies for years.
>
> Taxpayers have paid for an airport, roads, fire protection and sewers, improving property in towns where virtually all private land is owned by the polygamous church. Taxpayers also rehabilitated church-owned homes—in which residents must pass a faith test or face eviction.[73]

A decade later in Canada, expelled FLDS polygamist, Winston Blackmore, is in an income tax and welfare fight with the government.

Blackmore believes that—because the polygamy charges against him will lead to a Canadian Supreme Court challenge—the government should pay his legal bills (which the British Columbia Supreme Court refused to do in April 2010).[74]A concurrent battle, however, in a tax court reveals that he does not

> foot all—or even most—of the huge bills for caring for his many [i.e., twenty-two] wives and [119] children.
>
> All unemployed wives with children are instructed to seek the child-tax benefit, or even welfare, based on a single, low-income mother's rate or on the relatively tiny income Mr. Blackmore declares.
>
> Money earned by wives with well-paid jobs as midwives or teachers isn't counted as part of the total family income, leaving other wives free to reap financial benefits, such as paying sister-wives to look after their kids.[75]

Meanwhile:

> Blackmore is appealing his tax assessments, which claims he made close to $2-million over five years, but he reported income of less than 1/10 of that: Only $116,000.

> That left Mr. Blackmore's wives free to claim thousands of dollars in child-tax credits, since his 'family' income was supposedly as low as $25,000 in some years.[76]

Already the government was demanding that one wife pay back $24,000, and that another wife repay an unspecified amount.[77] From Blackmore himself and three brothers, the Canada Revenue Agency is demanding "more than $2 million in unpaid taxes, tax credits as well as unpaid penalties and fines."[78]

These examples, from four polygamous groups in two countries, reveal an attitude of entitlement amidst personal irresponsibility among many polygamists concerning the financing of their practice. Their attitude seems to be that God ordained their polygamous practice, so the disbelieving Gentiles should pay for it. Since something akin to this attitude has existed among polygamist Mormons for over a century-and-a-half, it seems endemic to the practice itself.

7. Marriages, Sexuality, and the State

Thus far I have argued that polygamy inherently violates a number of human rights and laws, but now I will argue that its continued criminalization does not violate human rights issues as exist within same-sex marriage issues. In essence, polygamous practice is not analogous legally to same-sex practices. I begin this argument by returning to the *Reynolds* decision.

While Chief Justice Waite referred to marriage as a contract, his mention of "social relations and social obligations with which government is necessarily required to deal" provides the basis for seeing marriage as a legal status. The state confers that legal status as a relationship between two people as a unit and the rest of the community.[79] In the *Potter* case, the United States Court of Appeals listed a number of rights and obligations that the status of marriage conveys, ranging from inheritance, child support and protection, premarital counseling, etc.[80] One could add privileges such as decision-making concerning the termination of medical treatment, legal exemptions from court testimony against a spouse,[81] the protection of confidential communications between spouses,[82] income tax exemptions, rights to sue on behalf of one's spouse,[83] pension and medical benefits, etc. Marriage, therefore, is not merely a contract; it is a social and legal status that gives the parties special legal rights and obligations. While the exact privileges will vary between Canada and the United States, the basic principles remain similar.

Legalization of polygamy would demand a complete reworking of existing marital-related legislation, causing insurmountable degrees of imbalance and unfairness to multiple spouses and possibly their children in relation to non-polygamous citizens. On issues involving such topics as pensions and inheritance, legal adjustments for polygamists likely would disadvantage polygamists themselves, as payments would get divided (and hence dissipated) among numerous recipients. Moreover, the current tax-filing problems that Winston Blackmore and his wives are having in Canada highlights the kinds of problems that occur around financial obligations within polygamous marriages.

Such massive reworking of marital-related laws, however, need not occur when states or countries legalize same-sex marriages. In essence, the same arrangements that exist in law for heterosexual marriage partners simply extend to homosexual partners. Legal actions involving one issue have no bearing upon the other. As concluded by legal scholar Maura I. Strassberg:

> The practice of same-sex marriage would not lead to despotism or undermine democracy, as the *Reynolds* Court feared polygamy would, nor would it undermine the way in which heterosexual marriage functions to teach, in a deep and concrete way, the lesson that the apparent sacrifices of individuality, required by the community, ultimately reestablish and strengthen individuality.[84]

Problems endemic to many Mormon fundamentalist polygamist communities—such as genetic abnormalities and medical risks caused by young (and possibly old) females' pregnancies—simply have no bearing on analyses of same-sex marriages. At its core, polygamy is not problematic because of the multiple sexual partners to which men gain access; it is problematic because of the foundational status of monogamous marriage to aspects of civil and family law, in addition to serious human rights abuses that appear in so many polygamous groups. Similarly, polyamory (simplistically defined as more than one partner) and homosexuality should not concern the law as long as the relationships involve consenting adults, in the absence of children, doing no obvious or demonstrable harm to themselves or others.[85] Polyamorous marriages, however (of which polygamy would be one type) inevitably encounter barriers when trying to imagine how the state could accommodate them.

As a form of marriage, polygamy suffers the opprobrium of international human rights condemnation. While the 1979 *Convention*

on the Elimination of all Forms of Discrimination Against Women[86] failed to specifically identify polygamy as a violation of women's rights, the 1994 "General Recommendations Made by the Committee on the Elimination of Discrimination Against Women" was clear and blunt:

> Polygamous marriage contravenes a woman's right to equality with men, and can have such serious emotional and financial consequences for her and her dependents that such marriages ought to be discouraged and prohibited. The Committee notes with concern that some States parties, whose constitutions guarantee equal rights, permit polygamous marriage in accordance with personal or customary law. This violates the constitutional rights of women, and breaches article 5 (a) of the Convention.[87]

Article 5 to which this passage refers directs:

> States Parties shall take all appropriate measures: (a) To modify the social and cultural patterns of conduct of men and women with a view to achieving the elimination of prejudices which are based on the idea of the inferiority or the superiority of either of the sexes or on the stereotyped roles for men and women.[88]

Having reviewed these and other international conventions and laws, Canadian human rights expert, Rebecca J. Cook, and J. D. candidate, Lisa M. Kelly, reached the following conclusions about women and children:

> Polygyny isolates their rights as articulated in international human rights law. Specifically, polygyny undermines the rights of women and children in relation to family life, security, and citizenship. While the discrete human rights contained within these realms are by definition universal, it is nevertheless clear that just as the harms of polygynous unions may differ according to their context, so also may the rights violations. Significantly, however, the right to equality within marriage and the family is violated *per se* by polygyny, regardless of the cultural or religious context in which it is practiced.[89]

In line with these conclusions, another Canadian law professor observed, "There is a growing worldwide trend towards prohibiting polygamy, even in societies where it has long, religiously based traditions, reflecting the greater recognition of equality, especially gender equality."[90]

8. POLYGAMY AS A THREAT TO THE DEMOCRATIC STATE

While showing so many forms of harm emanating out of polygamy, I have neglected to discuss what, historically, was the most important one: its threat to the democratic state. Scholars and jurists have criticized Chief Justice Waite's failure to provide clear examples of harm to the state, but one supporter of the *Reynolds* decision provided perhaps the most succinct defense of it and related early decisions:

> 19th century Mormon polygamous marriages operated to devalue and repress the individuality of all family members, promoted the significance of kinship ties in a way which prevented notions of abstract equality and common state citizenship, institutionalized the expanded family as the greater political structure, and socialized its adherents to accept personal, hierarchical rule as a model for the existence of governmental power. This then provided both an explanation and an enduring justification for 19th century legislative actions designed to prevent polygamous marriage from becoming a legitimate alternative within American society and 19th [century] judicial decisions upholding these acts.[91]

As is often the case, commentators in future generations see with clarity what few people had seen at the time of crucial events. Turning our gaze, however, to our own era, we have sufficient evidence to address the issue of polygamous harm and threat to democratic society without having to wait for those in the future to point them out.

One of the more creative contributions to the "polygamy/democracy harm" debate appeared in the form of an evolutionary biology perspective formulated by Canadian political scientist Tom Flanagan:

> Polygamous societies tend toward extreme authoritarianism and arbitrary government, with Draconian punishments to protect harems and control slaves and soldiers. Driven by millenniums of evolutionary pressure, young men will take extreme chances to find sexual gratification, so there have to be extreme punishments to control their libidinous passions. There is also a tendency toward permanent warfare, because plundering neighbouring peoples is the only way of satisfying the polygamous social system's limitless craving for women, slaves, and soldiers.
>
> Polygamous, authoritarian systems may achieve imperial conquest and cultural efflorescence, but they do not favour the growth of democracy.[92]

While Flanagan was basing his comments on a broad sweep of historic societies, with just slight adjustments his observations hold true for

the polygamous Mormon colonies in the West. Nevertheless, I do not adopt an evolutionary biological approach about the issue, nor do I take a philosophical one, as did Maura Strassberg, with her attempt to use Hegelian concepts to identify polygamy's antidemocratic threat.[93] Instead, I synthesize recent historical material—documents, media accounts, autobiographies, academic articles, etc.—into a multifaceted analysis of fundamentalist Mormonism's challenges to free and open societies.

Such an analysis surely must begin with the twin towns (but single FLDS community) of Hildale and Colorado City. More-or-less left to its own for decades after the Short Creek raid in 1953, the community could have developed itself in step with the evolving—and increasingly pluralistic and egalitarian—democracy around it. Instead, the community created a theocracy—one that had the governmental and civic positions that other towns had, but all controlled by polygamous men (never women) who answered to an unaccountable person whom they thought to be the Prophet. Everyone in a position of civic power—the town council, the mayor, the town clerk—were polygamists, elected by ballot, but only with one candidate per office according to the wishes of leading spiritual figure of the period.[94] Over time, polygamists filled other prominent positions—the school board, the local doctor, a judge, and the police force.[95] In fact, the Colorado City Law Enforcement Agency that civic leaders created during the 1960s, "had no recognized civil authority whatsoever and was only established so the Polygamist leaders could better control their young members."[96] Specifically the "paramount duty" of Peace Officer Sam Barlow "was to make sure that the boys would not associate with the girls. At his discretion, he would run the undesirable boys out of town. . . ."[97] Polygamous leaders wanted the young girls available to themselves as additional plural brides. The abuse of power that these polygamists demonstrated—and the manipulation of young citizens' lives for the personal and religious ends of religious leaders—violates fundamental assumptions about the rule of law, the importance of the vote, free association, and the right of people to make fundamental domestic and personal decisions for themselves.

We know far less about the operating structures of other polygamous groups, but all of them seem to have authoritarian, supposedly divinely blessed men at the center of power. So, when the leader of the True and Living Church in Manti, Utah, James Harmston, wrote an angry letter to his youngest bride (forty-three years his junior) about her refusal to sleep with him, he signed it, "Your Husband, King and Priest," and then circulated it to five more of his eighteen

spouses.[98] He saw his wives as his vassals or subjects, certainly not as equal partners in public and private spheres as life-partners.

Few people realize what role a polygamist doctor played in maintaining the polygamists' authoritarian reign over the community, especially over its young girls. The FLDS physician for both Hildale and Yearning for Zion was Dr. Lloyd H. Barlow, who began his practice sometime after 1999.[99] He would have known a great deal about sexual abuses in the FLDS community, since he was delivering babies and doing examinations. One notes with discomfort, therefore, that Texas authorities have charged him with "three misdemeanor counts of failure to report child abuse,"[100] although even if he had reported incidents to a law enforcement officer who had the mentality and skills-level of someone like Sam Roundy, the report would have gone nowhere. (Roundy was the officer who admitted not having forwarded up to two dozen child abuse reports to Child and Family Services.)[101] Unexplored in any academic or legal analysis, however, is how he (or possibly another doctor) may have been using mental health facilities and even a psychiatric hospital as ideological prisons for female polygamous dissidents and potential defectors.

Passing references hint that serious abuse of mental health facilities might be occurring. First, when Vancouver reporter and author, Daphne Bramham, summarized Carolyn Jessop's harrowing escape from Colorado City, Arizona, she indicated:

> Had she been caught, . . . Carolyn believes that the doctor, another priesthood man, would have diagnosed her as mentally ill and either drugged her—Carolyn estimates at least a third of the women in the community are on Prozac—or consigned her to a mental institution in Flagstaff, Arizona, where several other "rebellious" women from the community had been locked away.[102]

Similarly, Flora Jessop mentioned a cousin (Laurene) who had been an inmate in a Flagstaff, Arizona institution four times, and then after someone made an allegation against her, the police "just handcuffed Laurene and had her committed to a mental institution—standard procedure in the FLDS for disobedient wives."[103]

Are women who suffer trauma from, and harbor doubts about, the polygamous lifestyle and/or its leaders forced into a local mental health institution against their wills? Certainly we know about the use of psychiatric facilities to silence dissent from other contexts—the Soviet Union in the 1950s and Communist China, beginning in the late 1950s and occurring periodically until today. Both of these

societies were authoritarian, whose leaders viewed dissent as political threats by maladjusted people, and they used bogus diagnoses of mental disorders to justify incarceration in psychiatric institutions.[104] Leaders of these regimes always assumed that the individuals themselves were dysfunctional, not the social environments in which they developed their criticisms. Like the Soviet Union and Communist China, many fundamentalist Mormon communities are closed, authoritarian enclaves, unable to handle criticism and dissent. Polygamists' abuse of mental health facilities, therefore, would fit a larger, disturbing pattern of professional abuse and ethical violations in the context of a politicized psychiatry.

In some instances, therefore, polygamists may be willing to use and distort modern medicine (in this case, psychiatry) in order to maintain adherence to the practice and to the leaders who control it. On another issue—genetic diseases caused by inbreeding and incest—polygamists remain indifferent to information that challenges their beliefs and actions. Concerned about the number of genetic disorders within polygamous communities, doctors visited two different groups, hoping to educate them about why their babies suffered so many birth defects. Both visits were failures, due to the indifference of the polygamists themselves. In 1998, two geneticists from the National Institutes of Health traveled to Utah, hoping to hold a seminar for the Kingstons "about the dangers of incest and birth defects, and, presumably gain permission to study the clan." Only two members showed up, and neither of them was in a position of prominence or importance in the group. As one former member subsequently reported about the failed meeting, "'I tried to get people to come, but nobody would listen.'"[105]

In November 2004, a doctor who was concerned over the extensiveness of fumarase deficiency among members of the FLDS community held a town hall meeting that more than 100 members attended. Dr. Theodore Tarby explained in his presentation:

> that the only way to stop fumarase deficiency in the community is to abort fetuses that test positive for the disease and for the community to stop intermarriages between Barlows and Jessops, Barlows and Barlows and Jessops and Jessops.
>
> Tarby says members of the community made it clear that neither choice was acceptable. Tarby recounts a conversation he had with a member of the Barlow clan in which he tried to explain why so much fumarase deficiency was occurring among Mormon polygamists.
>
> "I said, 'You're married to somebody you're related to. That leads to problems.'"

> The man's response was, "Up here, we are all related," Tarby says. They just don't worry about the effects of intermarriage.[106]

Even when medical experts provide (or attempt to provide) medical advice that most people would see as obvious about the dangers of incest and inbreeding, members of two polygamist groups (whose total membership probably exceeds 10,000 people) ignore it. Adherence to ideologically driven marriage behaviors that their respective leaders either arrange or approve, continues to condemn infants in this generation and for generations to come to unbelievably painful, handicapped lives.

These polygamists refuse to take simple yet sound medical advice, but they are very willing to take money from the state to care for these and other children whose handicaps are the result of members' reckless and irresponsible practices. The FLDS community "was receiving more than $12 million a year in state assistance in Arizona to pay for health-insurance premiums." This money was in addition to the "tens of millions of dollars" it had received for its town government, its school, and its police.[107] Specifically for persons with fumarase deficiency and their families, the Arizona Department of Health Services and the Department of Economic Security provided them with services for more than fifteen years.[108] Unwilling to take officials' advice, the polygamists are very willing to take the state's money targeted to addressing a problem that its members' own behaviors cause.

Beyond the funds that polygamists obtain legally from the state, several prominent figures were not above taking additional funds illegally. Tom Green had to pay back the state tens of thousands of dollars; John Ortell Kingston returned hundreds of thousands. It remains to be seen how the financial battle involving Winston Blackmore and the government in British Columbia will conclude, but at this moment the Canada Revenue Agency says that he, his brothers, and various wives owe millions of dollars in reassessed taxes and related penalties. In addition to cheating various governments out of huge sums, many companies owned by polygamists underpay their workers and require them to work in unsafe conditions—actions that also may have tax advantages for the companies themselves, but which certainly damage other local (but honest) competitors.

One recent court decision involving yet another polygamist group concerned an effort to defraud someone who was attempting to buy land. In 2003, the (now deceased) leader of the Apostolic United Brethren, Owen Allred, was one of many conspirators who tried to

swindle a property-buyer out of $1.5 million, and a court ordered him to pay back a portion of the money ($30,000) to the victim (as part of a $1.5 million decision in the victim's favor). The Apostolic United Brethren itself had to repay $250,000—an amount that may grow, depending upon a district court's review of the case.[109] Fraud, therefore, seems to be widespread among the various fundamentalist Mormon communities, and it is not necessarily limited to actions against various governments.

In addition to examples of polygamous groups taking advantage of governmental funds illegally, one dramatic instance exists of a polygamist family using a legal ruling by a court to further the illegal practice of its members' group. In 1991, the Utah Supreme Court ruled that an adoption agency could not automatically bar a couple from adoption consideration because they lived polygamously.[110] After the ruling, Vaughn Fischer, his legal wife, Sharane, and his two additional wives were successful in adopting four children of the deceased polygamist, Brenda Thornton. (A fifth one had reached an age at which adoption was unnecessary.) Among the four children was an eleven-year-old named Janelle. Some years later while she accompanied Vaughn Fischer on a trip to Bountiful, British Columbia, ostensibly to attend a wedding, Prophet Warren Jeffs performed a second quick ceremony, marrying her to the Bountiful leader at the time, Winston Blackmore.[111] Now she is among the nineteen women (under the name, Janelle Lona Fischer) whom the Crown names as having been polygamously married to him.[112]

In sum, Utah's emphasis on adoption cases in the best interests of the child does not consider polygamy to be a disqualifying behavior. As a result of that consideration, a polygamous couple was able to adopt a young girl and then (several years later) transport (some would say, traffic) her across state and international borders in order to enter into a criminal act in Canada. It is difficult for many people to see, therefore, why practicing polygamy fails to disqualify Utah couples from the state's permission to adopt, given the assumption that an adopting family would rear children with polygamous values.

For all of these reasons and more,[113] the criminalization of polygamy must remain in effect in the United States and Canada,[114] and authorities should pursue it as a criminal offence more often and more vigorously. Arguments for its decriminalization or even legalization simply neglect to consider the widespread and abiding harm that is endemic to it. As with much behavior that generally is harmful, some people will not experience or perceive its negative consequences and even will endorse it and defend it. It is, however, inherently sexist, clannish,

antiegalitarian, theocratically authoritarian, and no society that is aware of its human rights obligations can allow it. Legalization in order to better regulate it also would not work, partly because polygamists lie to protect their practice and remain deeply hostile to outsiders. Polygamists will take outsiders' assets, but not their advice, at least regarding the genetic consequences of incest and inbreeding. Their past behavior suggests that they would resist adhering to most if not any attempts at regulation, even if polygamy were to be legalized. Avoiding the direct prosecution of polygamy unless it is coupled with other offences has led to the conviction of some criminals, but the strategy almost certainly misses numerous instances of serious crimes because of the groups' insularity and protectiveness of leaders. Moreover, the growing issue of birth defects is serious and heartbreaking, and these defects will multiply as long as the groups maintain primarily endogenous (and largely incestuous) marriage patterns.

Dissenting comments made in a Canadian Supreme Court decision also apply to general sentiments in its southern neighbor. "According to contemporary Canadian social morality, acts such as child pornography, incest, polygamy and bestiality are unacceptable regardless of whether or not they cause social harm. The community considers these acts harmful in themselves."[115] In the case of polygamy, however, we also can identify some of the harm that it actually does to society, and we understand why it is a threat to countries attempting to ensure the human rights of their citizens.

NOTES

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1. A basic definition of "Fundamentalist Mormon" appears in "The Primer" about polygamy, jointly published by the Attorneys General Offices of Arizona and Utah. "The term refers to people who believe they are following the original principles and doctrines, including plural marriage, taught by early [Latter-day Saint] Church leaders. The LDS Church opposes the use of this term and excommunicates members who practice plural marriage. Fundamentalists reject the authority claims of contemporary LDS leadership and consider the LDS Church to be in a state of apostasy" (Mark Shurtleff and Terry Goddard, *The Primer: Helping Victims of Domestic Violence and Child Abuse in Polygamous Communities*, Joint Publication of the Utah Attorney General's Office and the Arizona Attorney General's Office

[2006], 9; download available at: http://www.attorneygeneral.utah.gov/polygamy/The_Primer.pdf).

2. Stephen Singular, *When Men Become Gods: Mormon Polygamist Warren Jeffs, His Cult of Fear, and the Women Who Fought Back* (New York: St. Martin's Press, 2008), 262–81; Elisa Wall with Lisa Pulitzer, *Stolen Innocence: My Story of Growing Up in a Polygamous Sect, Becoming a Teenage Bride, and Breaking Free of Warren Jeffs* (New York: HarperCollins, 2008), 376–419; Aaron Falk and Dennis Romboy, "Warren Jeffs' Rape Conviction Overturned, New Trial Ordered," *Deseret News* (July 28, 2010).
3. The January 6, 2009 indictment against James Marion Oler charged him with having "practiced a form of polygamy, or practiced a kind of conjugal union" with two women (Canada: Province of British Columbia, Indictment of James Marion Oler, Court File Number 27166). The indictment of Winston Kaye Blackmore was for having "practiced a form of polygamy, or practiced a kind of conjugal union" with nineteen women (Canada: Province of British Columbia, Indictment of Winston Kay Blackmore, Court File Number 27165).

   Canada's *Criminal Code*, R.S.C. 1985, c. C-46, Section 293 states:

   1. Every one who (a) practises or enters into or in any manner agrees or consents to practise or enter into (i) any form of polygamy, or (ii) any kind of conjugal union with more than one person at the same time, whether or not it is by law recognized as a binding form of marriage; or (b) celebrates, assists or is a party to a rite, ceremony, contract or consent that purports to sanction a relationship mentioned in subparagraph (a)(i) or (ii), is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.

   For a brief discussion of the law, see M. H. Ogilvie, Religious Institutions and the Law in Canada, 2nd ed. (Toronto: Irwin Law, 2003), 373–74.

   Nine months after a prosecutor (who was the third successive one appointed by the British Columbia Attorney General about this issue) laid the polygamy charges, the province's Supreme Court quashed the appointment of that prosecutor and those charges. The basis for these decisions was that the first special prosecutor whom the Attorney General had appointed had recommended against laying specific charges, instead recommending that the province "reference" a case (i.e., present a query about the constitutionality of a law) to the Court of Appeal, inquiring whether polygamy charges were constitutional. According to British Columbia law, the decision of the first special prosecutor was final, and the Attorney General could not appoint subsequent prosecutors (with the hope of securing a different recommendation [*Blackmore v. British Columbia (Attorney General)*, 2009 BCSC 1299]). On October 22, 2009, the British Columbia Attorney General announced that he in fact was preparing to present to the province's Supreme Court

"two questions. The first will ask the court to determine if Section 293 is consistent with the [Canadian] Charter of Rights and Freedoms. The second will seek clarity on the Criminal Code provisions of Section 293" (British Columbia Ministry of Attorney General, "Province to Seek Supreme Court Opinion on Polygamy," October 22, 2009). Specifically, the second question will seek to clarify the legality of polygamous marriages with minors (Daphne Bramham, "At Last, the B.C. Government Makes the Right Move on Polygamy," *Vancouver Sun* [October 23, 2009]). Unlike a reference to the B.C. Court of Appeals, a reference to the Supreme Court allows witnesses to give evidence.

4. Most sources clarify that, technically, polygamy means marriage involving a spouse of either sex having two or more partners, while the fundamentalist Mormons practice is polygyny, which is one man with more than one wife (but not polyandry [one woman with more than one husband]). Nevertheless, use of the "polygamy" term is universal (along with "celestial marriage," "plural marriage," or "spiritual union") regarding the marriage practice within fundamentalist Mormon groups. An extended discussion of polygyny, polyandry, group marriage, and polygamy appears in Miriam Koktvedgaard Zeitzen, *Polygamy: A Cross-Cultural Analysis* (New York: Berg, 2008), 9–33.
5. Texas Department of Family and Protective Services, "Eldorado Investigation" (December 22, 2008).
6. Overall numbers vary from 21,000 (D. Michael Quinn, "Plural Marriage and Mormon Fundamentalism," in *Fundamentalisms and Society: Reclaiming the Sciences, the Family, and Education*, ed. Martin E. Marty and R. Scott Appleby [Chicago: University of Chicago Press, 1993], 242, see 280n17); 30,000 (Andrea Moore-Emmett, *God's Brothel* [San Francisco: Pince-Nez Press 2004], 26); 40,000 (Humphrey Hawksley, "Quest to Legalize Polygamy in Utah," *BBC News* (March 21, 2009), downloaded from: http://news.bbc.co.uk/go/pr/-/2/hi/programmes/from_our_own_correspondent/7953270.stm on May 4, 2009); and a figure given by a polygamist opposition group, Tapestry Against Polygamy, as being closer to 100,000 (cited in Moore-Emmett, *God's Brothel*, 26). Similarly, sometimes widely varying figures exist regarding the numbers of people in each of the numerous polygamous groups. Anne Wilde, who directs the pro-polygamy group, Principle Voices, indicates that surveys her organization conducted with polygamous leaders yielded the following figures: the Fundamentalist Latter-day Saints under Warren Jeffs has 10,000 followers; the Apostolic United Brethren (the Allreds) has 7,500 members; the Kingstons have 1500 members; and 3000 affiliate with groups of a few hundred or less. Perhaps 15,000 are "independents" are not part of any large group, and often primarily involve one family whose members center around one man. Some of these independents remain quietly within mainstream Mormonism, unbeknownst to Mormon officials (Carrie Moore and Elaine Jarvik, "Plural

Lives: the Diversity of Fundamentalism," *Deseret News* [September 9, 2006]). A researcher, however, who studied the Allreds in 1989 and into the 1990s estimated their numbers to be around 10,000 (Janet Bennion, *Women of Principle: Female Networking in Contemporary Mormon Polygyny* [New York: Oxford, 1998], 160n7). For brief histories of the FLDS and the Apostolic United Brethren, see Irwin Altman and Joseph Ginat, *Polygamous Families in Contemporary Society* (Cambridge: Cambridge University Press, 1996), 48–56.

7. What was an unwritten practice for decades among Utah officials around the avoidance of polygamy prosecutions became written policy by 2005, when Utah's Office of the Attorney General stated on its Web site, "Polygamy is illegal in Utah and forbidden by the Arizona constitution. However, law enforcement agencies in both states have decided to focus on crimes within polygamous communities that involve child abuse, domestic violence and fraud" (State of Utah Office of the Attorney General, "Polygamy," downloaded from: http://attorneygeneral.utah.gov'polygamy.html/ on June 13, 2006). See Marisa D. Black, "Beyond Child Bride Polygamy: Unique Familial Constructions, and the Law," *Journal of Law and Family Studies* 8 (2006): 497–508.
8. *Reynolds v. United States,* 98 U.S. 145 (1878). Note that some scholars give the year as 1879, because the court reconsidered its 1878 decision in 1879 and adjusted the sentence that plaintiff George Reynolds had to serve. The body of the decision, however, remained unchanged.
9. See Bruce A. Van Orden, *Prisoner for Conscience' Sake: The Life of George Reynolds* (Salt Lake City: Deseret Book Company, 1992).
10. Marci Hamilton, *God vs. the Gavel: Religion and the Rule of Law* (Cambridge: Cambridge University Press, 2005), 66–68, 207–8, 211–12.
11. Carol Weisbrod and Pamela Sheingorn, "*Reynolds v. United States*: Nineteenth-Century Forms of Marriage and the Status of Women," *Connecticut Law Review* 10 (1978): 833. See also James M. Donovan, "Rock-Salting the Slippery Slope: Why Same-Sex Marriage is Not a Commitment to Polygamous Marriage," *Northern Kentucky Law Review* 29/3 (2002): 586–87; and Keith E. Sealing, "Polygamists Out of the Closet: Statutory and State Constitutional Prohibitions Against Polygamy Are Unconstitutional Under the Free Exercise Clause," *Georgia State University Law Review* 17 (2000–2001): 714–15. Although dated regarding legal opinions, C. Peter Magrath, "Chief Justice Waite and the 'Twin Relic': *Reynolds v. United States*," *Vanderbilt Law Review* (1964–1965): 507–43, about Chief Justice Waite and the *Reynolds* decision, remains one of the best discussions of the case. Other very useful discussions of the historical and cultural context of the *Reynolds* decision include Robert G. Dyer, "The Evolution of Social and Judicial Attitudes Towards Polygamy," *Utah Bar Journal* 5 (1977): 35–39; Martha M. Ertman, "The Story of *Reynolds v. United States*: Federal 'Hell Hounds' Punishing Mormon Treason," in *Family Law*

Stories, ed. Carol Sanger (New York: Foundation Press, 2008), 52–75, especially for her discussion of George Reynolds; Jay Alan Sekulow, *Witnessing Their Faith: Religious Influence on Supreme Court Justices and Their Opinions* (Toronto: Rowman & Littlefield, 2006), 87–121; and Bruce R. Trimble, *Chief Justice Waite, Defender of the Public Interest* (New York: Russell & Russell, 1970) for his book-length biography of the presiding Chief Justice. Also noteworthy for its clarity, detail, and historical sensibility is Sarah Barringer Gordon, *The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth-Century America* (Chapel Hill: University of North Carolina Press, 2002), 109–45.

Among the most comprehensive discussions of nineteenth-century legislation and cases involving polygamy are Orma Linford, "The Mormons and the Law: The Polygamy Cases. Part I," Utah Law Review 9 (1964–1965): 308–70; and "The Mormons and the Law: The Polygamy Cases. Part II," Utah Law Review 9 (1964–1965): 543–91 (but note an occasional Mormon bias).

12. Elijah L. Milne, "Blaine Amendments and Polygamy Laws: The Constitutionality of Anti-Polygamy Laws Targeting Religion," *Western New England Law Review* 28 (2006): 287, see 271.
13. Michele Diane Wilson, "Adolescent Pregnancy and Contraception," in *Oski's Pediatrics: Principles and Practice*, ed. Julia A. McMillan, Catherine D. DeAngelis, Ralph D. Feigin, and Joseph B. Warshaw (Baltimore: Lippincott Williams & Wilkins, 1999), 543.
14. James H. Johnson and Andrew S. Bradlyn, "Assessing Stressful Life Events in Childhood and Adolescence," in *Handbook of Child Health Assessment: Biopsychosocial Perspectives*, ed. Paul Karoly (Toronto: John Wiley, 1988), 321.
15. Texas Department of Family and Protective Services, 14.
16. F. Gary Cunningham, Norman F. Gant, Larry C. Gilstrap, John C. Hauth, Kenneth J. Leveno, and Katharine D. Wenstrom, "Hypertensive Disorders in Pregnancy," *Williams Obstetrics*, 21st ed. (Toronto: McGraw Hill, 2001), 567–618; Mounira Habli and Baha M. Sibai, "Hypertensive Disorders of Pregnancy," in *Danforth's Obstetrics and Gynecology*, ed. Ronald S. Gibbs, Beth Y. Karlan, Arthur F. Haney, and Ingrid E. Nygaard, 10th ed. (Philadelphia: Lippincott William & Wilkins, 2008), 257–75; *Merck Manual of Diagnosis and Therapy*, "Preeclampsia and Eclampsia," 18th ed. (Whitehouse Station, NJ: Merck Research Laboratories, 2006).
17. Ray Rivera and Greg Burton, "Did Teen Mom Die Harboring a Secret?" *Salt Lake Tribune* (August 23, 1998): 1.
18. Greg Burton and Ray Rivera, "Child Lives with Polygamous Clan After Controversial Death of Mom: Polygamous Clan Now Raising Disabled Child," *Salt Lake Tribune* (August 30, 1998): A1.
19. Roger J. R. Levesque, *Sexual Abuse of Children: A Human Rights Perspective* (Bloomington, IN: Indiana University Press, 1999), 136.

20. Greg Burton, "When Incest Becomes a Religious Tenet: Practices Sets 1,000-Member Kingston Clan Apart From Other Utah Polygamous Groups," *Salt Lake Tribune* (April 25, 1999): A17.
21. Ray Rivera and Greg Burton, "Case of Young Mom's Death is Dying Quietly; Child: Boy Can Stay with Father in Another Incestuous Marriage; Girl's Son Can Stay with Incestuous Dad," *Salt Lake Tribune* (September 17, 1998): 1.
22. Ibid., 2.
23. Ben Winslow, "Shurtleff: Child Bride Polygamous Marriages Appear to Have Stopped," *KSL-TV* (July 14, 2009).
24. Jonathan Turner and Alexandra Maryanski, *Incest: Origins of the Taboo* (London: Paradigm, 2005), 1.
25. Joseph Smith married at least one mother/daughter pair, and likely had a child with the daughter (Todd Compton, *In Sacred Loneliness: The Plural Wives of Joseph Smith* [Salt Lake City: Signature Books, 1997], 171–204). He also married at least two sets of sisters (ibid., 288–305, 473–85). Likewise, Brigham Young also married sisters (Fanny Stenhouse, *'Tell It All:' The Story of a Life's Experience in Mormonism* [Hartford, CT: A. D. Worthington, 1874], 277–78), and Ann-Eliza Young's 1876 critique of her former group claimed, "The marriage of mother and daughter to one man was so common an occurrence that it ceased to be regarded as anything out of the ordinary course of events" (*Wife No. 19, of The Story of Bondage, Being a Complete Exposé of Mormonism, and Revealing the Sorrows, Sacrifices, and Sufferings of Women in Polygamy* [Hartford, CT: Dustin, Gilman & Co., 1876], 320). Incestuous examples in early Mormonism were so dramatic that a researcher published an article in a medical journal on them in 1915 (Theodore Schroeder, "Incest in Mormonism," *American Journal of Urology and Sexology* 11 [1915]: 409–16). For mention of contemporary mother-daughter marriages in the Allreds, see Bennion, *Women of Principle*, 162n22.
26. Wade C. Myers and Steve J. Brasington, "A Father Marries His Daughters: A Case of Incestuous Polygamy," *Journal of Forensic Science* 47/5 (September 2002): 1.
27. See Flora Jessop and Paul T. Brown, *Church of Lies* (San Francisco: Jossey-Bass, 2009), 46, 56, 68; Carolyn Jessop with Laura Palmer, *Escape* (New York: Broadway Books. 2007), 313; Moore-Emmett, God's Brothel, 94–95; and Dorothy Allred Solomon, Predators, Prey, and Other Kinfolk (New York: W.W. Norton & Company, 2003), 243.
28. Ray Rivera, "When Incest Becomes a Religious Tenet: Inbreeding Key to Doctrine of Keeping Bloodline Pure," *Salt Lake Tribune* (April 25, 1999): A1, A16.
29. Ray Rivera, "Polygamist Gets Jail Time For Beating His Daughter," *Salt Lake Tribune* (June 30, 1999): A1, A7; Maura I. Strassberg,

"The Crime of Polygamy," *Temple Political & Civil Rights Law Review* 12 (2003): 367.

30. *Utah v. Green,* 108P.3d 710 (2005); see John Llewellyn, *Polygamy's Rape of Rachael Strong* (Scottsdale, AZ: Agreka, 2006), 67–92.
31. Debbie Palmer and Dave Perrin, *Keep Sweet* (Lister, BC: Dave's Press, 2004), ix.
32. Jessop and Brown, *Church of Lies*, 264 see 89.
33. Bennion, *Women of Principle*, 164n14.
34. Janet Bennion Cannon, "My Sister, My Wife: An Examination of Sororal Polygyny in a Contemporary Mormon Fundamentalist Sect," *Syzygy: Journal of Alternative Religion and Culture* 1/4 (Fall 1992): 319.
35. Worth mentioning is that an 1861 presentation contained information about "physical abnormalities" within Mormonism, which practiced polygamy at the time (Richard S. Van Wagoner, *Mormon Polygamy: A History*, 2nd ed. [Salt Lake City: Signature Books, 1989], 106, 113n3). One author interpreted this presentation as a nineteenth-century example of opponents' "belief that polygamy created genetic abnormalities" (Sealing, "Polygamists Out of the Closet," 744), but it predates Gregor Mendel's groundbreaking publication about genetics by five years. Instead, the pejorative description of Mormons (which was opposite how they saw themselves) probably reflected belief at the time that "excessive seminal effusion" associated with polygamy weakened the body (B. Carmon Hardy and Dan Erickson, "'Regeneration—Now and Evermore!': Mormon Polygamy and the Physical Rehabilitation of Humankind," *Journal of the History of Sexuality* 10/1 [January 2001]: 48–49).
36. John Dougherty, "Forbidden Fruit: Inbreeding Among Polygamists Along the Arizona-Utah Border is Producing a Caste of Severely Retarded and Deformed Children," *Phoenix New Times* (December 29, 2005), downloaded from http://www.phoenixnewtimes.com/content/printVersion/178037 on June 16, 2009; Jessop and Brown, *Church of Lies*, 246; Cassandra L. Kniffin, "Fumarase Deficiency," *Online Mendelian Inheritance in Man,* #606812 (Baltimore: Johns Hopkins University, May 20, 2008), available online.
37. Dougherty, "Forbidden Fruit," 2; see Brent W. Jeffs with Maia Szalavitz, *Lost Boy* (New York: Broadway Books, 2009), 18.
38. John Hollenhorst, "Birth Defect Plaguing Children in FLDS Towns," *KSL-TV* (February 9, 2006).
39. Dougherty, "Forbidden Fruit," 3; see Jessop and Brown, *Church of Lies*, 167, 246.
40. Burton, "When Incest Becomes a Religious Tenet," 5.
41. Ibid., 6–7.
42. Greg Burton, "Family, or, Felony?" *Salt Lake Tribune* (June 11, 2000). "Classical lissencephaly (smooth brain) is a human brain malformation which consists of diffuse agyria and pachygria, an abnormally thick 1–1.5 cm cortex, and associated changes such as

hypogenesis of the corpus callosum and enlarged posterior portions of the lateral ventricles." Its classical manifestations "consist of severe or profound mental retardation, feeding problems, and intractable epilepsy including frequent infantile spasms." It has a genetic component (William B. Dobyns, "The Genetic Basis of Malformations of Neuronal Migration: Molecular Mechanisms and Clinical Correlation," in *Abnormal Cortical Development and Epilepsy: From Basis to Clinical Science*, ed. Roberto Spreafico, Giuliano Avanzini, and Frederick Andermann [London: John Libbey & Company, 1999], 266, 267).

43. What appears to be a different type of genetic disorder—mental illness—afflicts members of another polygamous band, the LeBarons. The LeBaron factions emanate from the offspring of Alma Dayer LeBaron and Maud McDonald, and, "of the three girls, all would suffer delusions of either grandeur or paranoia. Of the seven LeBaron boys, six would claim to hear voices, five would have hallucinations they interpreted as divine revelation, and four would claim to be the Lord's Prophet on earth" (Scott Anderson, *The 4 O' Clock Murders: The True Story of a Mormon Family's Vengeance* [Toronto: Doubleday, 1993], 50; see Ben Bradlee, Jr., and Dale Van Atta, *Prophet of Blood: The Untold Story of Ervil LeBaron and the Lambs of God* [New York: G. P. Putnam's Sons, 1981], 45–61, 84]; Rena Chynoweth with Dean M. Shapiro, *The Blood Covenant* [Austin, TX: Diamond Books, 1990], 11, 13; Verlan M. LeBaron, *The LeBaron Story* [Lubbock, TX: Keele, 1981], 60–61, 66–67; Irene Spencer, *Shattered Dreams: My Life as a Polygamist Wife* [New York: Center Street, 2007], 43–44).
44. See Altman and Ginat, *Polygamous Families*, 89; see also Jen Pereira, Kiran Khalid, and Emily Yacus, "Two Polygamist Sect Survivors Tell Their Stories," *ABC News* (July 7, 2008), for a LeBaron girl twice forced into marriage at thirteen.
45. Benjamin G. Bistline, *The Polygamists: A History of Colorado City, Arizona* (Scottsdale, AZ: Agreka, 2004), 56, 120, 212; Carole A. Western, *Inside the World of Warren Jeffs* (Albuquerque, NM: Wyndham House Publishing, 2007), 352–53; see Jessop with Palmer, *Escape*, 313; John Llewellyn, *Polygamy Under Attack: From Tom Green to Brian David Mitchell* (Scottsdale, AZ: Agreka Books, 2004), 108; Wall with Pulitzer, *Stolen Innocence*, 12.
46. See Stephen A. Kent, "A Matter of Principle: Fundamentalist Mormon Polygamy, Children, and Human Rights Debates," *Nova Religio* 10/1 (2006): 17. *Doctrine and Covenants* Section 132 purports to be a revelation that Smith received on July 12, 1843, although this date was well after he had begun the practice of plural marriage. An early section instructs, "19. And again, verily I say unto you, if a man marry a wife by my word, which is my law, and by the new and everlasting covenant . . ., and if ye abide in my covenant . . ., it shall

be done unto them . . . and shall be of full force when they are out of the world; and they shall pass by the angels, and the gods, which are set there, to their exaltation and glory in all things. . . . 20. Then shall they be gods, because they have no end. . . .” Presumably, a different wife helps her husband pass the angels and gods in the three heavens (identified in Section 131) and then enter into the realm of godliness itself (hence the need for at least three wives). In later sections, the reputed revelation specifically outlined polygamy: “61. And again, as pertaining to the law of the priesthood—if any man espouse a virgin, and desire to espouse another and the first give her consent, and if he espouse the second, and they are virgins, and have vowed to no other man, then he is justified; he cannot commit adultery for they are given unto him; for he cannot commit adultery with that that belongeth unto him and to no one else. 62. And if he have ten virgins given unto him by this law, he cannot commit adultery, for they belong to him, and they are given unto him; therefore is he justified.” One doctrinal reason, therefore, that polygamists desire young girls as plural brides is that these teens are likely to be virgins. The next passage is one that believers see as identifying children as soul-bearers who are beginning the process of moving toward divinity: “63. . . . for [the virgins] are given unto him to multiply and replenish the earth, according to my commandment . . ., and for their exaltation in the eternal worlds; that they may bear the souls of men . . .” (Church of Jesus Christ of Latter-day Saints, The Doctrine and Covenants of the Church of Jesus Christ of Latter-day Saints [Salt Lake City: Church of Jesus Christ of Latter-day Saints, 1981], 268ff).

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48. Altman and Ginat, *Polygamous Families*, 466.
49. Angie Wagner, “Ousted from Sect, ‘Lost Boys’ Start Anew,” *Chicago Tribune* (September 7, 2004): 10.
50. United Nations High Commissioner for Human Rights, *Convention on the Elimination of All Forms of Discrimination against Women*, adopted and opened for signature, ratification, and accession by General Assembly Resolution 34/180 of December 18, 1979, entry into force September 3, 1981, in accordance with Article 27(1), downloaded from: http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm on June 23, 2009.
51. United Nations High Commissioner for Human Rights, *Convention*; see Rebecca J. Cook and Lisa M. Kelly, *Polygamy and Canada’s Obligations Under International Human Rights Law,* Family, Children and Youth Section Research Report (Ottawa: Department of Justice Canada: September 2006), 28–30; Kent, “A Matter of Principle”: 10–16; Levesque, *Sexual Abuse of Children*, 134–39.
52. Erik Eckholm, “Boys Cast Out by Polygamists Find Help,” New York Times (September 9, 2007), downloaded from: http://www.

nytimes.com/2007/09/us/09polygamy.htm on September 10, 2007; Kimberly Sevcik, "The Lost Boys of Colorado City," *Salon.com* (July 6, 2006): 1, downloaded from: http://www.salon.com/mwt/feature/2006/07/06/lost_boys/print.html on July 8, 2006; Wagner, "Ousted from Sect." Books by apostate men include David Beagley, *One Lost Boy: His Escape From Polygamy* (Springfield, UT: CFI, 2008); Jeffs with Szalavitz, Lost Boy; and Brian Mackert, *Illegitimate: How a Loving God Rescued a Son of Polygamy* (Colorado Springs, CO: David C. Cook, 2008).

53. Wall with Pulitzer, *Stolen Innocence*, 49.
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55. Bramham, *Secret Lives of the Saints*, 259, 265–66.
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65. See Llewellyn, *Polygamy Under Attack*, 44–66.
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106. Quoted in Dougherty, "Forbidden Fruit," 6–7.
107. Ibid., 5; see Bramham, *Secret Lives of the Saints*, 152–53.
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110. *Johanson et al. v. Fischer et al.,* 808 P.2d 1083 [Utah 1991]; see Ken Driggs, "Utah Supreme Court Decides Polygamist Adoption Case," *Sunstone Magazine* 83 (September 1991), downloaded from http://www.childbrides.org/politics_suntone_UT_Sureme_Court_decides_polyg_adoption_case.html on March 22, 2009.
111. Bramham, *Secret Lives of the Saints*, 209–18.
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113. Space prohibits a list of criminal (especially sexual abuse) convictions that have occurred among the groups, but they are legion and I already have mentioned some of them throughout the text. For examples of polygamist-related murders, see Anderson, *4 O' Clock Murders* and Chynoweth with Shapiro, *Blood Covenant* (concerning the Ervil LeBaron family and followers, which took place from 1972 to 1988). Note that, until her capture in May 2010, family member, Jacqueline Tarsa LeBaron, was on the Federal Bureau of Investigation's "Wanted" list for "conspiracy to commit murder for consideration; murder for consideration; conspiracy to tamper with a witness; tampering with a witness; use of a firearm during a crime of violence; conspiracy to obstruct religious beliefs; obstruction of religious beliefs; RICO [Racketeer Influenced and Corrupt Organizations] conspiracy; [and] RICO" (Federal Bureau of Investigation,

"Featured Fugitive—Jacqueline Tarsa LeBaron," downloaded from FBI Website on April 1, 2009; Bob Mims, "A Fugitive 17 Years: Last Suspects in Polygamous Sect Slayings in Custody," *Salt Lake Tribune* (May 15, 2010). On the 1984 murders of Brenda Lafferty and her fifteen-month old child by Brenda's two brothers-in-law (Daniel and Ron Lafferty) because of her resistance to their efforts to recruit her husband (their brother) into polygamy, see Jon Krakauer, *Under the Banner of Heaven: A Story of Violent Faith* (New York: Anchor Books, 2004). On polygamist shoot-outs with police (resulting in deaths), see David Fleisher and David M. Freedman, *Death of an American: The Killing of John Singer* (New York: Continuum, 1983); Ogden Kraut, "The Singer/Swapp Siege: Revelation or Retaliation?" *Sunstone* (November 1988): 10–17 (for John Singer and his son-in-law, Addam Swapp). For harboring a fugitive (Warren Jeffs) by a younger brother, Seth Steed Jeffs, see Don Mitchell, "Jeff's Brother Pleads Guilty to Harboring Fugitive," *Associated Press* (May 2, 2006). About Warren Jeffs's nephew, Benjamin Jeffs Nielson, refusing to testify before a grand jury, see *Austin Chronicle*, "Naked City," (August 4, 2006). About Canadian officials deporting three polygamist wives of Winston Blackmore back to the United States because of immigration violations, see Manson, "Canada Orders 3 Plural Wives to Exit Country."

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Chapter 9

Catholicism: Fundamentalism In the Canon Law Tradition

Thomas P. Doyle

Roman Catholicism is the largest, oldest and probably most complex of the Christian denominations. Over the past two decades Catholicism in the United States and in other Western countries has seen a remarkable return to the traditional. Vatican Council II which ended 44 years ago, launched a period of change that touched nearly every aspect of the Church from its liturgies and rituals to its core beliefs. The Church appeared to be moving away from the model of a highly clerical, male-dominated monarchy to a more egalitarian movement realistically in touch with the ever-changing world in which it existed. The atmosphere of change brought a sense of relief and freedom to many. The so-called spirit of Vatican II was also seen as a profound threat to others, including the clergy and hierarchy who had such a great stake in the institution as it had been before the Council.

Church leadership at the highest levels has reacted to the liberalizing trends through a series of official changes in liturgical rules, restricting involvement of lay men and women, and reinforcing the centrality of the priest. They have also reacted by gradually yet effectively diminishing the involvement of lay persons in church administration. Two effective responses by Catholic leadership at the highest level have been the centralization of more powers in the papal office, and the appointment of bishops who are highly orthodox, unquestioningly loyal to the pope, and vigorous in their defense of any encroachments on Church power or influence.

This chapter is about Catholic fundamentalism and how it has been influenced by the Church's legal system and by the worldwide scandal of sexual abuse by clergy. Therefore it is best to begin with a working understanding of the meaning of *Catholic* fundamentalism, since this brand differs in significant ways from the fundamentalism found in other Christian and non-Christian denominations.

Broadly speaking, fundamentalism is a historically recurring movement that develops within cultures experiencing core-based change or social crisis. Fundamentalism within the Catholic Church has been an emotional reaction to the wave of change introduced by Vatican Council II and which continued to permeate the Catholic structures and community, bringing what many believed have been changes in the very essence of the Church. Catholic fundamentalism, like other religious fundamentalism, is marked by doctrinal rigidity; anger and rage directed at coreligionists who in any way threaten the perceived status quo; irrational fear of any discussion or debate about doctrine, teachings, or theological principles; a cult-like appeal to the authority of the papacy; and the perversion of the legal system (Canon Law) to a self-serving weapon. Catholic fundamentalism, like other religious fundamentalism, is always dangerous. It interjects a virus of fear and anger into the Church community that easily turns to hatred. It grossly distorts the meaning of "Church" from a community founded on Christian principles to a monarchical institution that reacts with paranoia and self-righteousness at any perceived challenge or even a question no matter how trivial. It reacts to those who challenge it with its own brand of violence such as purging, destruction of reputations, slander, or loud and irrational spiritual condemnation.[1]

Catholic fundamentalism is easily confused with orthodoxy or conservatism. It has been more properly associated with traditionalism and the traditionalist movement. William Dinges' in-depth study of Catholic Traditionalism provides a well-documented connection. His essay in Martin Marty and Scott Appleby's monumental study, *Fundamentalism Observed*, provides an apt description of Catholic traditionalism that easily applies to fundamentalism:

> Traditionalists do not promote their cause as one option within a pluralistic Catholic ecclesiology but as the only acceptable Roman Catholic alternative to the modernist-inspired conciliar Church . . . Traditionalism is also an action-oriented ideology. It is a position that seeks not merely to state an ecclesiology within the Catholic tradition but to discredit and eliminate all others. Traditionalist rhetoric is dominated by the imagery of spiritual warfare and mission.[2]

Catholic fundamentalism fuels the various traditionalist movements that have sprung up since Vatican II. The most prominent has been the "alternative" Catholic Church embodied in the Fraternity of St. Pius X, founded by the late Archbishop Marcel Lefebvre. Lefebvre reacted to the liturgical changes manifested by Vatican II, seeing in them a general abandonment of the authentic Catholic Church. Lefebrvre's movement actually began as a reaction within the institutional Church but gradually moved outside the authority of Rome (by 1975) until the official excommunication of the archbishop and his followers in 1988. He was preceded however by the efforts of Fr. Gommar De Pauw who founded the Catholic Traditionalist Movement in 1965.[3]

Ironically the present pope, Benedict XVI, has devoted significant energy to rehabilitating the followers of Lefebvre. On January 21, 2009, he lifted the excommunication of the four bishops illicitly consecrated by Lefebvre in 1988, the act which resulted in Lefebvre's own excommunication. Prior to this act however, the pope had restored the pre-conciliar, Tridentine Liturgical practices in July 2007. The traditionalist cause had centered on the old liturgy which symbolized not only their view of Catholic culture, doctrine, and tradition but also symbolized the isolationist elitism of the Traditionalists. In effect the pope had given legitimacy to Catholic fundamentalism.[4]

The most visible Catholic Traditionalists/fundamentalists have ended up as schismatic sect-like groups outside of Vatican authority. The more radical of these, known as *Sedevacantists,* have even denied the validity of the present pope and his last three predecessors, hence their name which means "empty chair" referring to the papacy. The traditionalist cause is zealously promoted by a number of groups that remain within the Church as well. These groups base their legitimacy on true and orthodox loyalty to the pope and their unquestioned acceptance of all papal teachings. Although these groups do not constitute fundamentalist movements, they manifest certain fundamentalist attitudes, expressions, and tactics. The more prominent groups that have enjoyed legitimation by the papacy are Opus Dei, Communione e Liberazione, The Legionnaires of Christ, The Priestly Fraternity of St. Peter, and the Institute of Christ the King, Sovereign Priest. These groups have been supported by the contemporary hierarchy that has been increasingly supportive of traditionalist ideas and actions.

None of these organizations would define itself as fundamentalist, yet all show most of the distinguishing characteristics of fundamentalism. The most controversial of the traditionalist groups has been the Legionnaires of Christ. This cult-like religious order has been one of the fastest growing religious communities in today's church due in no

small part to the extraordinary patronage and visible support of Pope John Paul II. The order's founder, Fr. Marcial Maciel-Degollado, enjoyed a special closeness with the late pope and was regularly singled out by the pope and other high-ranking Vatican prelates as an exemplary guide for youth while his rapidly growing order was accorded very obvious deferential treatment by Vatican authorities and many other bishops around the globe, including in the United States.

The order's fortunes took a decidedly downward turn when the Vatican publicly confirmed on May 19, 2006, that there was credible evidence of the accusations that Maciel had sexually abused a number of youthful seminarians many years ago. Pope Benedict XVI ordered Maciel to cease public ministry and to live out his life in prayer and penance. He died on January 30, 2008. In 2009 it was revealed that he had fathered a child by a Spanish woman both of whom are presently living in Spain. After years of controversy and a variety of accusations including cult-like behavior, oppressive methods in the seminary, and financial irregularities, the Vatican took the very rare step of ordering an official investigation of the entire order.[5]

The Catholic fundamentalists seek to recreate the Church as they believe it existed prior to the momentous upheaval brought on by Vatican Council II. Many still remember the pre–Vatican II Church with what certainly appears to be romantic idealism. The younger members, and there are many, were either infants or not even born when this Church was in its prime. Contemporary Catholic fundamentalists are convinced their vision of the Catholic Church is the authentic remnant carrying the banner of orthodox fidelity while the rest of the Church has fallen prey to the various strands of modernism and relativism. The causes of this phenomenon are not rooted in a Church gone astray or a world gone mad with materialistic secularism. Something more profound has caused it to take place.

Albert Einstein is quoted as having said, "When a paradigm can't solve a problem with the paradigm in which it was created, that's when you get a paradigm shift." Einstein was a scientist and not a theologian but his theory can be applied to religious structures. Catholicism is not only a religion but a major sociocultural force. It is also the only denomination recognized by the community of nations as a sovereign nation. The structural, liturgical, disciplinary, and theological changes that resulted from Vatican Council II were the result of a dissonance between the Church and the world around it. In a real sense this dissonance was the problem Einstein spoke of and it was a problem the Catholic paradigm could not solve. The paradigm

shift was underway before Pope John XXIII announced the Council in 1959 but it was only acknowledged by a small number, most of whom were treated as heretics.[6]

Several noted theologians had predicted that the worldwide Catholic Church was out of touch with the contemporary world and the gap would only increase and eventually erode the Church's effectiveness. Ironically some of these scholars, who had been censured or sidelined by Vatican authorities in the years prior to the Council, were to become rehabilitated and ended up as leading voices shaping not only conciliar decisions but the shape of the Church to come.[7]

The reaction of the Catholic Church to the cultural and theological shift from the 1960s onward has been a steady movement away from the external elements, liturgy, customs, and culture of the pre-Vatican Church but also a distancing from the deep-seated attitudes, ways of believing, and values of this Church. A natural reaction to this process, which can be likened to the movement of a glacier, has been the emergence of Catholic fundamentalism. The earliest reaction was during the Council itself when the more conservative or traditionalist prelates struggled long and hard with those who wanted change. Their success was obviously minimal in light of the changes that were voted upon by the approximately 2500 bishops, archbishops, and cardinals who were seated as voting members of the assembly.

The traditionalist movements, such as that started by Archbishop Lefebvre and the Catholic Traditionalist Movement, were a reaction to the Council. These and similar organizations were outside the authority of the pope and therefore not officially part of the Church. The traditionalist-oriented organizations that have grown have been those that had been under the authority of the papacy from the beginning. *Opus Dei* (1928) and the *Legionaries of Christ* (1941) were founded well before the Vatican Council and appeared to be in the mainstream of the pre-conciliar Church. Both groups stressed a strict, traditional spirituality, complete loyalty to the pope, and absolute acceptance of all Church doctrine, teaching, and discipline. The fundamentalist traits of each organization emerged and became prominent as the paradigm shift became more apparent.

The popes who have reigned during the paradigm shift have been alarmed at the profound changes in the Church's standing in Western societies and its diminishing influence over individual and collective behavior. Predictably they have not looked within but have defended the Church's timelessness and laid the blame on forces from outside. Pope John Paul II and Pope Benedict XVI have laid the blame on a rejection of legitimate authority, the excessive influence of materialism

and hedonism in secular society, and the seduction of the younger generation by secular, relativistic values. The breakdown of the traditional structures within the Church is not attributed to their possible irrelevance but to the impact of outside forces. The present pope, who as a young priest had been a *peritus* or expert at the Council, spoke to this issue in 1984 in his famous interview of the state of the Church, later to be published as the *Ratzinger Report.*

> I am convinced that the damage we have incurred in these twenty years is due, not to the "true" Council, but to the unleashing within the Church of latent polemical and centrifugal forces; and outside the Church it is due to the confrontation with a cultural revolution in the West: the success of the upper middle class, the new tertiary bourgeoisie, with its liberal-radical ideology of the individualistic, rationalistic and hedonistic stamp.[8]

It is said that in the pre–Vatican II era that all Catholics were essentially fundamentalists.[9] Catholics were shaped by a deeply ingrained sense of obedience and reverence for the clergy and hierarchy. The Church was essentially a stratified society with the bishops and priests leading and the laity taught that their only obligation was docile and unquestioning obedience. There was rigid uniformity in the liturgy, a major part of Catholic life. There was also an elitist mentality fostered by the common belief that Catholicism was the "true" religion and therefore its members were superior to those from other faiths. Dissent was practically unheard of and most important, corruption among the clergy was deeply buried under a thick blanket of secrecy.

The shift in the theology and religious culture of Catholicism was part of a wider shift in secular culture that began in the early 1960s.[10] Catholic conservatives and traditionalists, clergy and lay alike, believed at the root was a crisis of papal and episcopal authority. The problem, as Church leaders saw it, was not that those in authority needed to rethink their approach. The erosion of the spirit of docile obedience not only by significant numbers of clergy but by lay people as well posed the threat to ecclesiastical tranquility.

The Catholic Church was rocked by the revelations of sexual violations of children and minors beginning in the United States in 1983. What first appeared to the public as a localized problem rapidly spread throughout the country and in time manifested itself in the Catholic Church in other countries as well.[11] The blanket of secrecy began to unravel, and as it did the stories of abuse revealed a pattern of cover-up

and denial by the bishops as well as a complete failure of the Church's legal system, Canon Law, to respond to the many reports of sexual abuse by clergy from nearly every diocese in the United States.

We can apply Einstein's words about paradigms to the sex abuse scandal, now twenty-five years old and showing no signs of dying. This indeed has been a problem caused in and by the traditional Church paradigm that the paradigm could not solve. The abuse scandal did not cause the paradigm shift for this movement was well underway decades before the first revelations in the 1980s. However, it has contributed to reactive fundamentalism because it has exposed a particularly sordid pattern of corruption among the clergy. The angry response has naturally been directed at the perpetrators but the most intense and lasting anger has been directed at the Church's hierarchical leadership due to their systematized inadequacy of response.

The impact of the scandal on the Church has been complex. A significant number of scholarly studies have examined the possible causes as well as the various ways it has affected the Church as an institution and as a believing community. In addition to the scholarly work, there are a number of books and articles that tell the stories of the victims.[12] My purpose is not to describe this complicated web of effects but to place it in the context of the Church legal system, showing how this system is an integral player in the fundamentalist response to the steady movement of change. The Church's structures and culture are changing as a result of the sex abuse scandal as is its place in secular society.

The Church is, in reality, *not* an ideological and structural monolith. It is not limited to the pope, bishops, and priests. It is a community comprised of clergy and lay people with different levels of authority and mission. When people look for the Church's response to the sexual abuse problem they usually refer to responses by the pope or the bishops. This is deemed the "official response." In light of the fundamental definition of the Church as *People of God*, grounded in Church teaching, the concerns and expressions of anger and frustration by the laity are also valid responses.

A significant degree of deference is paid to institutionalized religions by secular society in the United States and in many other countries. This is especially true of the Catholic Church, perhaps because it is the oldest Christian denomination with a long history of powerful influence on various institutions such as the judiciary, the media, and government. This deference has prevented people from demythologizing both the institutional structures and the canonical system. To understand its role in the abuse scandal, one must delve

into the complex historical development of leadership and authority in the Catholic tradition.

Organized religion has traditionally been presumed to be a force for good. Marci Hamilton begins her book *God vs. The Gavel* with a blunt statement of a truth that has ample historical foundation: "The United States has a romantic attitude toward religious individuals and institutions, as though they are always doing what is right . . . The unrealistic belief that religion is always for the good, however, is a hazardous myth."[13] One need only look at the historically verified examples of inhuman behavior in the name of religion for proof. Catholicism alone is responsible for a significant share of such behavior.

The courts in our country have traditionally been deferential toward religious institutions and professional religious practitioners such as bishops, priests, nuns, ministers, and rabbis. In spite of centuries of historical evidence of the harm that can come from religious conviction and fanaticism, our civic culture still finds it both painful and guilt-inducing to hold organized religious entities and professional religious persons accountable before the law with the same objectivity that is expected of lay persons or secular organizations. Chapter 9 of Marci Hamilton's recent book provides a description of the rise and fall of the legal and judicial favoritism of religious institutions.

Why People Show Deference to Organized Religion and Churches . . . And Their Rules

From the dawn of history, men and women have created religious belief systems and religious societies whereby they attempted to communicate with unseen gods. In his book *Religion Explained*, scholar Pascal Boyer sums up the theories of the origins of religion:

> Most accounts of the origin of religion emphasize one of the following suggestions: human minds demand explanations, human hearts seek comfort, human society requires order, human intellect is illusion-prone.[14]

All religious entities such as denominations, institutions, organizations or churches are essentially "man-made" though many claim to be of divine origin. Religion is a mysterious and powerful force in society because it acts as a bridge or a gateway to the unknown. As societies evolved and became more knowledgeable about the world around them, religion maintained control and often proved to be the strongest opponent of more enlightened explanations of the forces of nature as well as other unexplainable human events.

Although religious systems have been created to relieve or displace the fear prompted by the unknown with a sense of security, these same systems have themselves caused fear. Well-intentioned religious leaders often use this fear to influence people to avoid wrongdoing. Religious leaders have also resorted to unjust and irrational fear, claiming their powers to be of supernatural origin, when in reality the object of the fear is not obedience to angry gods but control by humans. The gloom and fear that seem fundamental to some expressions of Christianity can be as mysterious as the unseen supernatural powers.

Religious concepts are connected to human emotional systems. These systems react to life-threatening situations or other forces that cannot be readily controlled. Returning to Boyer, we read:

> It is probably true that religious concepts gain their great salience and emotional load in the human psyche because they are connected to thoughts about various life-threatening circumstances. So we will not understand religion if we do not understand the various emotional programs of the mind.[15]

Catholic fundamentalism is intimately tied to the traditional, dogmatically expressed notion of the priesthood. The Catholic priesthood is grounded in the central role of *sacrifice* in the Church's life. Originally sacrifice came about as a way of placating the gods. Mortals gave the first and best crops, the fatted calf, money, and various promises of good behavior to them in return for their benevolence. There is even evidence of human sacrifice in several religious systems. With the notion of *sacrifice* comes the concept of *priesthood*.

Priesthood is the most ancient form of religious office. The *priest* has traditionally, though not exclusively, been male. It is an office or role given to one who is thought by the community to be favored by the deities, hence the privileged position in the religious community. The priest is the special person deputed by the community and favored by the gods to lead worship services but especially to offer sacrifices on behalf of individuals and the community. Because of their closeness to the deities, the priests themselves have traditionally been thought to have special powers.

Though civilization evolved and became more knowledgeable of the world around it, the essential power of organized religion remained grounded in the unknown. In a word, the historical power and influence of religion can be reduced to the single concept of *fear*.

Fear of the unknown and of some form of divine "payback" after death certainly influences the deference shown to organized religion and its leaders. No doubt a significant degree of respect is due to the charitable works and the good that many religions accomplish. On the other hand respected sociological studies point also to the controlling influence of organized religion, which is not derived from good works but rather from its role in helping people avoid divine displeasure.

Sociologist Tom Inglis studied the role of the Catholic Church in the social and political life of the Republic of Ireland and concluded that the Church's influence over various aspects of Irish life converged to a common denominator: the Church leadership presented it as the only source of spiritual security and as the sole mediator between the people and the God whom they portrayed as just and stern. Concerning this power he says:

> It was the power over people's consciences, instilled in churches, schools, hospitals and homes which made the church unlike any other power bloc in Irish society. It was a power which, as every politician knew, could be exercised at any time with devastating consequences.[16]

Author John Whyte is even more specific in naming the reason for the Catholic Church's power:

> The Maynouth Parliament (i.e., the hierarchy) holds a weapon which none of the other institutions holds: the weapon of the sacraments . . . When the Catholic Church, through its representatives speaks, he [the prime minister] realizes that if they disobey they may draw on themselves this weapon whose touch means death.[17]

Catholics are taught that the sacraments are essential to their spiritual well-being and are indeed the source of spiritual salvation. The seven rituals correspond to major life moments and rites of passage. Access to the sacraments is essentially controlled by the clergy especially the bishops, who have used this access to influence secular political activity. In the recent presidential election several bishops declared that Catholic candidates who held views that the bishops considered unacceptable, especially in the area of abortion rights, could not receive the Eucharist. This tactic was praised by some in the "orthodox" or conservative camps and roundly criticized by many others for the subjective politicization of the Eucharist, the fundamental spiritual element in the Catholic faith.

The harm done to individuals by organized religion is too often minimized or dismissed outright because of the false perception that to call churchmen (or churchwomen) to task is to risk negative social and economic consequences. Churches have not been called to account for their wrongdoing with the same objectivity as have private businesses or public institutions. There is often not only the appearance but the reality that Churches and their clergy are above the law. The reasons will often be a mixture of unspecified deference, magical thinking, or misunderstanding as to the role of religion in our lives. Organized religious bodies have enjoyed and encouraged a significant degree of mythology about them. Possibly the first serious cultural and theological challenge to this mythology occurred with the Protestant Reformation. In the past few decades this mythology has been challenged once again, much to the chagrin of church leaders of all denominations.

The clergy sexual abuse scandals that have plagued Catholicism (and several other denominations, though to a lesser degree) have served as a cultural and religious catalyst for an increasingly critical look at the role of the Catholic Church in secular society. This criticism has provoked a fundamentalist reaction in no small part because the privileged place of the institutional Church is challenged as well as the authority and exalted roles of the pope and bishops.

Canon Law and the Catholic Church

Canon Law is the name for the legal system of the Roman Catholic Church. It is the world's oldest continuously functioning legal system. Canon Law is not equated with God's law nor is it a summary of the required beliefs of Roman Catholics. It is the collection of rules and norms that form the internal regulatory system of the institutional Church.

The name comes from the Greek word *kanon* which means a straight line or a rule. Each of the individual rules that make up the system is known as a "canon." The basic collection of the laws of the Catholic Church is known as the *Code of Canon Law*. There have been two such Codes in the history of the Church. The first was officially published, or promulgated, in 1917 and contained 2414 separate canons, many of which were divided into subparts or paragraphs. The Code was revised between 1965 and 1983 and the revised version promulgated on January 25, 1983. The new collection of canons reflected the changes mandated by the Second Vatican Council (1962–65) and contains 1752 canons.

The remote origins of Canon Law reach back to the fourth century with the passage of 84 canons or rules at a gathering of bishops in Spain. The disciplinary laws passed at this Synod of Elvira are generally considered to be the first expression of Canon Law. Similar gatherings of bishops occurred in other areas where the Catholic Church had been established.

As the church evolved from a religious movement to an established social and political institution, it had an increasing need for legal structure. By the early medieval period, church lawyers had gathered the canons passed at various councils and synods into Canonical Collections. These collections were neither systematized nor official but did reflect the types of issues facing the institutional church as well as the various ways the bishops sought to face these problems.

The vast tangle of laws was first systematized in the twelfth century by a monk named Gratian. He published his momentous work in 1140. The official name is the *Concordance of Discordant Canons* but it is commonly known simply as *Gratian's Decree*. Church law continued to consist in rulings issued by the popes, groups of bishops, and individual bishops. Canon Law was the dominant force in the pre-Vatican Church. This led to the natural fundamentalism that aptly expressed the monolithic nature of the Church culture of the times. The post-Vatican fundamentalism appears to be an ideological expression apart from the mainstream of Church life yet it appeals to the same legal system that supported the pre-conciliar heavily clericalized culture. Catholic fundamentalism depends on a highly centralized political structure with all power vested in a small elite of individuals. The canonical system supports this monarchical expression of political power in theory and in practice.

According to the Church's official teaching, expressed in dogmatic statements and in Canon Law and unofficially expressed in its culture, the institutional Church is *hierarchical* according to divine institution. In other words, Christ himself established the Church as a non-democratic institution and willed that all power be vested in ordained, male leaders.[18] The unique stature of the bishops and priests is grounded in the nature of priesthood and in the divine support for the leadership offices.

Official Catholic Church law is passed by those individual officeholders invested with the power to enact laws, namely, the pope and diocesan bishops. There is no legislature in the Catholic Church. The three essential offices of government: executive, legislative, and judicial, are joined in the papal office. Likewise the three are expressed in the office of diocesan bishop. Those who assist in the formulation of

laws, in the administration of the laws or in the judging of disputes do so with power delegated either by the law itself or by the pope or a bishop. There is no separation of powers in the Catholic Church and consequently no true system of checks and balances. The Church's legal system reflects this fundamental political structure to the extent that it can realistically be said that the law is what the pope and the bishops want it to be.[19] Canon Law and indeed all Church Law is officially interpreted only by the legislator, the pope or a bishop of a diocese, and not by a "supreme" court that functions independently from the legislator.

To fully understand the influence of Canon Law, one must look to its origins and to the influence of Roman Law. Western society experienced a significant period of development in the twelfth and thirteenth centuries. The Catholic Church was more instrumental than any other social force in the establishment of the Roman Law as a foundation for the legal structures of secular society because it had based its Canon Law upon the rediscovered fundamental works of Roman Law, namely the *Codex Iustinianus*, the *Digestum,* and the *Institutis*. These three sources were compilations of the Emperor Justinian, published from 529 through 534. Although Roman Law was essentially the product of a non-Christian culture, its use by the Church and by the Christianized European civilizations was justified by St. Thomas Aquinas (fourteenth century) who taught that it was based on a philosophy that was to a large extent in conformity with Divine Law.

In appealing to Divine Law, Aquinas, the foremost theological scholar in the Catholic Church's tradition, distinguished God's Law from the rule and regulations of the Catholic Church. The inspiration for his thought on Roman Law was the Greek philosopher Aristotle (384–322 B.C). Divine Law was, for both Aristotle and Aquinas, the fundamental civilizing influence grounded in the author of life. The author of Divine Law is the author of life and not the personal deity of any humanly created religious system.[20] The Divine Law, which precedes human law, is also the foundation of natural law that resides in human reason. In proposing the pre-Christian Aristotelian idea that law based on reason conforms to Divine law, Aquinas bypassed the idea that civil society needed to be based on the Christian concept of brotherly love to be authentic. In sum he taught that although the Roman Law was the product of a secular culture it was nevertheless ordered to a just and civilized society.

Gratian, the foremost architect of the canonical system, was heavily influenced by the structure, concepts and systemic integrity of Roman

Law. The preface of the 1917 *Code of Canon Law*, written by its primary architect, Pietro Cardinal Gasparri, says: "[F]inally he [Gratian] took not a few citations from Roman and Germanic law."[21] Gratian wrote at a time when the Catholic Church was the only Christian denomination and was integrated into society in a manner much different from today. Canon Law emerged as the predominant legal system for Church *and* secular society in the period of the intellectual, social, and cultural renewal of the middle ages:

> During the middle ages, Canon Law regulated areas that would today be thought of as thoroughly secular, such as business, warfare and marriage. Together with Roman Law, Canon Law formed a coherent and autonomous legal system, the so-called "ius commune" (European common law). This system was the only legal system that was studied at universities, and during the middle ages it was in fact used in local judicial practice and in producing local law codes.[22]

The canons are not expressions of theological truth nor are they part of the body of doctrine held by the Church. They are regulations that help to put order into the institutional life of the Church. While certain canons are direct expressions of theological truths, especially the canons that pertain to the sacraments, the overall purpose of the canonical system is to facilitate order. In the Apostolic Constitution that introduced the revised Code, Pope John Paul II said:

> the Code is in no way intended as a substitute for faith, grace, charisms, and especially charity in the life of the Church and of the faithful. On the contrary its purpose is rather to create such an order in the ecclesial society that, while assigning the primacy to love, grace and charisms; it at the same time renders their organic development easier in the life of both the ecclesial society and the individual persons who belong to it.[23]

This brief look at the historical roots of Canon Law shows that as a legal system it is not the product of purely internal Church doctrine with little or no relationship to the secular world. It is a legal system created to support the Catholic Church as a sociopolitical community in the midst of the secular world. It gives structure to the ideological definition of this external community. Throughout most of the Church's history the predominant model of government was monarchy. Most secular monarchs believed that their existence was due to divine will. As the Catholic Church evolved through the centuries the office of the papacy, once considered a bishopric that was first among equals, gradually became the seat of centralized power

in the Church. The Church believes and teaches that the electors of the pope are guided by the Holy Spirit, the Spirit of God. Upon his election the pope assumes the title of Vicar of Christ.[24] The absolute and total power of the papacy, as is clearly expressed in Canon Law, is grounded, whether historically accurate or not, in an act of God:

> The bishop of the Church of Rome, in whom resides the office given in a special way by the Lord to Peter, first of the Apostles and to be transmitted to his successors, is head of the college of bishops, the Vicar of Christ and Pastor of the universal Church on earth; therefore, in virtue of his office he enjoys supreme, full, immediate and universal ordinary power in the Church, which he can always freely exercise.[25]

Control of the Law: The Source of Fundamentalism

The commonly accepted and generally unchallenged doctrine of the Catholic Church is that the hierarchical governmental model was established by Jesus Christ and is therefore both intrinsic to the Church and immutable.[26] This is articulated in countless theology texts, articles, official pronouncements, and in the *Code of Canon Law* itself.[27] The essential element of this model is the authority of the pope. The tradition, as expressed in both official and popular Catholic literature, is that Christ himself appointed St. Peter as the first pope, established the Church as a hierarchical political structure, and commanded Peter to rule with absolute and total authority and to pass this authority on to his successors.[28] Herein is the source of fundamentalism in the Church's law and in its exercise of authority: the belief in the divine origin of papal authority.

The absolutist nature of this authority in the contemporary Church is apparent in several significant areas: reservation of the appointment of bishops to the pope; diminution of academic freedom in Catholic universities; elimination of certain liturgical norms that featured lay participation (reclericalization of the liturgy); Vatican control over the synod of bishops and the harsh response from the Vatican to any theological writings it considered doctrinally questionable.[29] All of these expressions are grounded in a fundamentalism that appeals to the absolute authority of the pope as its justification.

Throughout the current clergy sex abuse "crisis" the Catholic bishops and the papacy have focused on the sexually dysfunctional clerics, while the laity, media, academic world, civil court systems, and general public have focused on the bishops' collective mishandling

of the overall situation. While many have seriously questioned this mishandling as an abuse of authority and insisted on full accountability followed by objective self-criticism and the introduction of shared responsibility, both the Vatican and the bishops have refused to yield. They base their position on the claim that both offices, papacy and bishopric, are instituted directly by Christ and for this reason cannot be validly scrutinized by any subordinate power. Bishops are subject only to the review of the pope and the pope answers to no human power.[30]

The hierarchy's response to the sexual abuse revelations has caused religious and secular scholars to examine more closely the historical and doctrinal foundations for the fundamentalist assumption that bishops are above scrutiny. When questioned, supporters of the absolutist position appeal to tradition, scripture and the constancy of history. Yet there exists no scriptural or historical documentation that directly affirms that Christ intended to found a church. Furthermore there is no direct evidence that he established a hierarchy or that he established Peter as a pope.[31] The early Church was structured around the bishop as elder, not as hierarch. The model for the exercise of leadership is found in the scriptures: "Let the leader become as one who serves."[32] In spite of this, the role of the bishop historically and today is one of an absolute ruler. The visible symbols and ceremonies of the hierarchy prior to the Vatican Council resembled those of a renaissance court with a wide variety of elaborate robes and other decorative accoutrements, all of which were supposed to honor and enhance the role of the bishop as a descendant of the Apostles. In keeping with its spirit of communicating with the modern world, the participants of the Vatican Council changed the liturgy in hopes that it would more closely reflect its theological meaning. The elaborate array of robes worn by prelates was drastically reduced with a view to making the clerical world look less like a royal court.

Participation in Church government is not entirely unknown in the Canonical tradition contrary to the claims of many fundamentalists. Certain of the medieval canonists, Huguccio[33] being the foremost, argued that when church councils discussed matters of faith, lay representatives must be summoned since any decisions concerning the practice of the faith touched all. The papacy was on the ascendance at this time yet Huguccio also argued that in matters of faith a council's authority eclipsed that of a pope.[34]

General councils are the foremost assembly of Catholic leadership. There have been twenty-one throughout history, the first being the

Council of Nicea (325 AD) and the most recent, Vatican Council II (1962–1965). The first four (Nicea, 325; Constantinople 381; Ephesus 431; Chalcedon, 451.) are regarded by church historians as the foundational councils in that they worked through a number of doctrinal issues and formulated much of the dogma that is still in place. The pope was not present at these councils nor was his approval necessary for the validity of the conciliar decisions. This stands in stark contrast to the present era when papal affirmation is essential for any conciliar decree to have force. Papal power over councils is such that he alone can convoke them, yet the first eight were called by Christian emperors. The pope can also go against the majority in a council. The pope alone creates, changes, or suppresses the laws of the universal Church. His power is such that it reaches to individual dioceses and persons. He can also change or suppress laws created by bishops for their territory. Finally, the pope alone appoints all cardinals (who elect his successor), personnel for the Vatican bureaucracy, and all bishops.

In order to justify a canonical fundamentalism grounded in papal authority as all-encompassing and definitive, the concept needed to be framed in such a way that the hand of God was apparent. St. Bonaventure (1221–1274), Franciscan friar, later theologian, then bishop and finally a Cardinal, first developed the theory of the high papalist position. He taught that the pope stands in the place of Jesus Christ, and consequently all power given by Christ to the Church is grounded in, and mediated by, the pope.

Bonaventure did not have the last word. In spite of the legislative activity of the medieval popes, which managed to centralize power in the papacy, there remained significant proponents of participatory government. The most renowned was St. Thomas Aquinas, generally considered the most influential thinker in Catholic history. Thomas taught that the best form of government combined the virtues of monarchy, aristocracy, and democracy:

> Such is the best polity, well mixed from kingship insofar as one presides over all; from aristocracy insofar as many rule according to virtue; and from democracy, that is, the power of the people, insofar as the rulers can be chosen from among the people and their election belongs to the people.[35]

Although the centralization of power in the papacy was well under way by the end of the medieval period modern practices of representative and participatory government were not alien to the

Church tradition.[36] The Reformation was a religious and political reaction to a papacy and hierarchy out of control. It was followed in the sixteenth century by the Church's counterreaction, the Council of Trent (1545–1563). Though this council enacted a wide range of reforms and innovations (seminaries and territorial parishes for example) it did not diffuse the power of the papacy. The First Vatican Council (1869–1870) added, at the insistence of Pope Pius IX, the doctrine of infallibility.

By the beginning of the twentieth century, the imperial papacy was firmly entrenched. Its zenith came with the accession of Pius XII to the throne in 1939. During the course of his papacy, the bishops were little more than vicars of the pope. Pius assumed more and more power to the papacy under the conviction that he was, indeed, the human representative (Vicar) of Jesus Christ and that God's will for the world was that all people someday be joined together in God's love but under the authority of the Pope. This was Pius' preoccupation from his early days as a papal diplomat and into his years as pope.[37] Pius XII died in 1958 and was succeeded by the famed John XXIII. Though he only reigned for approximately five years, he managed to change the course of Catholic history by calling for an ecumenical council and insisting that the windows of the Church, long closed to the world around it, be opened.

The Second Vatican council attempted to bring the institutional Church into the modern world. Had John XXIII lived to see the end of the council and the beginning years of its implementation, it is possible that canonical fundamentalism might well have been buried, at least for a time. The *Code of Canon Law* was undergoing a total revision that would not be completed until 1982. Initially there was a draft of a fundamental law of the church, a kind of basic constitution that would have paved the way for more participatory structures. This project was rejected under the papacy of John Paul II (1978–2005). The revised Code was published in 1983 and with it the basis for Catholic fundamentalism, the absolutist nature of papal and Episcopal power, was confirmed. The belief that the pre-Vatican fundamentalism, the norm for Catholic life, was defunct was now on shaky ground. The reactionary fundamentalism epitomized by Archbishop Lefebvre was very quietly being legitimized.

Pope John Paul II reigned from 1978 to 2005. During this period he centralized papal power to an extent that had not been experienced since the time of Innocent III.[38] During his reign, the pope succeeded in radically changing the worldwide body of bishops to reflect his vision of the Church rather than reflecting the diversity

of the world's cultures. Key requirements for appointment have been absolute orthodoxy as orthodoxy had been defined by the pope, and unquestioned loyalty to the Holy See. Fundamentalism was again firmly in place.[39]

From the middle ages until Vatican Council II the Church was officially described by the papacy as a society of unequals. Pope Pius X best described its political structure in a 1906 encyclical entitled *Vehementer Nos*:

> This church is in essence an unequal society, that is to say a society comprising two categories of persons, the shepherds and the flock. . . . These categories are so distinct that the right and authority necessary for promoting and guiding all the members toward the goal of the society resides only in the pastoral body [the pope and bishops]; as to the multitude, its sole duty is that of allowing itself to be led and of following its pastors as a docile flock.[40]

This was not a new concept with Pius X but a restatement of what had been the standard doctrine from the time the Church was officially recognized by Constantine in 313. It was enshrined in the 1917 *Code of Canon Law*. More important, this institutionalized inequality enabled the growth of destructive clericalism that most Catholics, clergy and lay, simply took for granted. It also strongly encouraged the latest wave of fundamentalism because it supports the concept of absolute authority claimed by popes and bishops as well as the exalted role of clerics.

While many in the Church anxiously waited for the equality proclaimed by the council to take root in the day-to-day life of the Church, the reality of what had happened is dramatically different. Once the council ended, forces within the Church, threatened by the prospect of a diminution of clerical power and privilege, began a process of reinterpreting the meanings of many conciliar statements. This process became increasingly apparent during the lengthy pontificate of John Paul II. The so-called Catholic restoration is grounded in the traditional fundamentalist beliefs of the absolute power of the pope as Vicar of Christ and of the bishops as direct descendants of the apostles. Democracy is not seen as another form of governmental structure but as *movement contrary to the very will of God*. Not only is democracy as a political system deemed heretical, but democratic attitudes in the exercise of power, necessary for the implementation of many reforms called for by the Vatican council, are considered anti-Catholic and therefore unacceptable. This ersatz return to the traditional Catholic governance is, in truth, a rejection of the authentic tradition.

The clergy abuse phenomenon brought out the worst in the institutional Catholic Church. The inability of the papacy and of local bishops to respond in a just and pastoral manner has demonstrated that the Church's legal system perpetuates institutional inequality and enshrines an especially anachronistic brand of patriarchy. In the early years of the scandal (1984–88) critics could not understand why the bishops had done nothing to stop the perpetrating clerics and why the Bishops' nationwide Conference (The United States Conference of Catholic Bishops) offered no concrete direction. The blame was laid on Canon Law, which the bishops claimed prevented them from taking decisive action against the offenders and also prevented the bishops' conference from creating any nationwide policies. Critics from the clergy and laity concurred that one of the causes was the way Church government was exercised by the papacy and the bishops. Any suggestions that reform was needed were met with angry resistance, arrogantly expressed by the ecclesiastical rulers who perceived such calls as attacks on the Church itself.

Ecclesiastical Law and Secular Legal Systems: Church as Community and As Institution

The Christian movement became an officially recognized religion in the early fourth century through recognition by the Emperor Constantine. As it slowly evolved into a political institution existing in the midst of the imperial society, the Church began to take on aspects of the dominant monarchical political structure. Although St. Thomas Aquinas later refuted the notion of the "divine right of kings," this philosophy heavily influenced the formation of Christian political structures. The Church borrowed from the world around it and developed a political-governmental structure that has remained in place throughout its history.

The Church does not define itself as "monarchical" but as "hierarchical" in nature and claims that this model was imposed by God Himself. *Hierarchy* means "holy origin" or "holy dominion." The concept has been used since the third century to describe a governmental ordering believed to have been given to the Church by its Creator.[41] Yet historical evidence demonstrates that the concept of *hierarchy* originated not with Jesus but with a disciple of St. Paul, writing about five hundred years after Jesus.[42] Here then we see an appeal to Divine authority to authenticate the adoption of a secular political model for a religious society.

Throughout its history the Church has borrowed various aspects of secular legal systems. As it adapted many of these, the tendency on the

part of Church authorities was to claim that in doing so, the Church was "Christianizing" secular law. In the Apostolic Constitution that officially published the 1917 Code, Pope Benedict XV said, in reference to the Church, that it had promoted the development of civilization by its own legal system active in secular society. The Pope's rendition of the influence of Roman Law illustrates the superior attitude of the institutional Church:

> By these laws and enactments . . . she [the Catholic Church] promoted also most effectively the development of civilization . . . but likewise, with God's assistance, she reformed and brought to Christian perfection the very law of the Romans, that wonderful monument of ancient wisdom which is deservedly styled written reason, so as to have at hand, as the rule of public and private life improved, abundant material both for medieval and modern legislation.[43]

As the sexual abuse scandal unfolded in the United States, victims took their grievances not to the ecclesiastical authorities but to the civil courts. The scrutiny of Church files obtained through the discovery process revealed that the required canonical process for responding to reports of abuse was very rarely used in the several thousand cases that made it to the civil courts. In spite of the obvious ineffectiveness of the Church's legal system, there has been a significant fundamentalist resistance to referring clergy abuse cases to civil authorities. Certain high-ranking Vatican prelates have insisted that the Church handle such cases and not the civil courts.[44] The foundation for this claim is the historical "privilege of the forum" a concept with deep historical roots which was enshrined in Canon Law and laid to rest at Vatican II.

The ancient "privilege of the forum" held that clerics (deacons, priests, bishops, cardinals) could not be summoned as defendants or accused in secular courts without the explicit permission of Church authorities. Accused clerics were to be tried *only* before ecclesiastical tribunals. Although this privilege had been a source of contention between secular authorities and the Church for centuries, it was repeated in the 1917 Code (canon 120) but dropped from the revised Code. Those who violated the canon and summoned a bishop or higher prelate before a secular court in a civil or criminal matter were subject to automatic excommunication (canon 2341).[45]

In a related though not identical matter, bishops of two dioceses have appealed to the superiority of Canon Law in determining the ownership of Church property. Archbishop John Vlazny of Portland

Oregon stated publicly that he would follow Church law in spite of a civil court ruling that stated that ownership in secular society follows civil law.[46] On the other side of the same issue, Vatican authorities upheld the Boston archbishop's right to close parishes and seize their assets. The Boston parishioners had appealed to the same canonical ruling to justify their assertions of ownership that the archbishop of Portland had used to resist the civil court's ruling by claiming non-ownership. In other words, Archbishop Vlazny, faced with possible loss of parish properties to pay settlements with sex abuse victims, claimed that according to Canon Law, the archbishop did not own the property. At the same time on the other side of the country, Cardinal O'Malley, faced with opposition to the unilateral closure of about eighty parishes, claimed that according to Canon Law the bishop owned the property and therefore could close the parishes.

Canon Law has no definitive role in the judicial resolution of Church disputes in the civil courts. This point was made abundantly clear in the Spokane and Portland cases where the judge determined that Canon Law was irrelevant to the resolution of the disputes. Even in the Republic of Ireland, where the Roman Catholic Church has been given a privileged place in the Irish Constitution, Canon Law is not welcomed in the civil courts as a determinant in resolving disputes. This was clearly stated by an Irish judge who, when confronted by an attempt by the Church's barrister to appeal to Canon Law stated that "Canon Law has as much relevancy in this court as golf rules."

Fundamentalism Is a Symptom and Not a Solution

The long-standing paradigm of the monarchical model of the Catholic Church has been seriously threatened by the contemporary world in a manner never before experienced. The basic challenge the institutional Church could not resolve has actually not been one but a series of challenges from various sectors of modern society. Rather than open itself to a serious and objective discussion of the many issues, the institutional Church has reacted, falling back on its traditional power and influence in secular society. This tactic has proven to be increasingly ineffective. Theologians who have proclaimed their loyalty yet have offered new ways of looking at fundamental issues have been investigated and censured in a manner reminiscent of the Inquisition. The Vatican has responded to calls for an examination of such issues as ordination of women, optional celibacy for priests and the prohibition of birth control by abruptly stating that there will be

no change in policy and any discussion is forbidden. In spite of the Vatican's orders, discussion and dissent have increased.

The most serious problem the institutional Church has faced in centuries has been the sexual abuse of minors by clerics, nuns, and religious brothers on a worldwide scale. Revelations of abuse started in the United States in 1984 and over the years have spread throughout the world. The credibly accused have included members of all ranks of the clergy including at least one cardinal (the late Hans Hermann Groer of Vienna). Although there has been sexual abuse by clergy throughout the Church's history, the contemporary wave is unique because the institutional Church has been unable to control or resolve the scandal as it always had in the past. The impact of fundamentalism is apparent in the official Church's responses.

The common denominator to the constant revelations has been the refusal by the popes and the hierarchy to concede that anything about Church structures, the way authority is exercised, the clerical culture, or the traditional theology of sexuality has anything to do with the reasons why clerics have molested the vulnerable. The institution has remained defensive about its responses to the scandal, all the while seeking to either shift the blame or change the focus. For example, although Pope John Paul II was aware in detail of the abuse crisis in 1984, he issued no statements about it until 1993 when he wrote a public letter to the U.S. bishops. In this letter he shifted all the responsibility for the scandal to the offending priests and then tried to turn the focus from the abuse itself to the messenger of the bad news by criticism of the secular media for publicizing it:

> While acknowledging the right to due freedom of information, one cannot acquiesce in treating moral evil as an occasion for sensationalism. Public opinion often feeds on sensationalism and the mass media play a particular role therein.[47]

The image of the priesthood, already diminishing over the past thirty to forty years, has been dealt a crippling blow by the seemingly never-ending revelations of internal corruption. As if the sexual abuse scourge had not been damaging enough, added to it has been a spate of cases of embezzlement of Church funds within the past five years.

The response to the severe problems facing the priesthood has clearly been fundamentalist in nature. Rather than look within for possible answers to the rapidly decreasing number of recruits to the priesthood, the official response has been to blame the contemporary "philosophies" of individualism, materialism, and hedonism. Faced

with repeated criticism that the traditional role of the priest is irrelevant and unrealistic, Pope Benedict XVI declared a "Year for Priests." In his inaugural letter on June 16, 2009, he held up as the example for priests of the twenty-first century, a nineteenth-century French parish pastor, St. John Vianney, whose ministerial practices suited his age but are profoundly out of step with the contemporary church. The values and practices held up by the pope are those of a bygone era, yet it is this era that the contemporary fundamentalists romanticize.

The paradigm shift that is underway has prompted a renewed fundamentalist reaction. There can be little doubt that the pope and the world's bishops have been profoundly moved by the diminishing influence of the clergy, by the refusal of the civil community to show deference to the hierarchy in regard to clergy crimes, and by their dwindling influence in the secular political arena. Added to this is evidence of the increasing number of Catholics who are walking away from the institutional Church. A 2008 Pew Forum study showed that Catholicism in the United States suffered the most dramatic losses of any denomination.[48] In another brief review of the Catholic Church statistics as published in the Official Catholic Directory of the United States, the author, Jerry Filteau, reported that the Catholic population rose by over a million in 2006, nearly all of whom were immigrants. At the same time the statistics reported that the number of baptisms, marriages, seminarians, and ordinations to the priesthood dropped in keeping with trends over the past few years.[49]

In response to the changing paradigm with its decreasing numbers and diminishing influence, Catholic fundamentalism has become more visible and more pronounced. Trends among young priests and seminarians show a marked conservatism and near obsession with traditional orthodoxy. There is also a renewed interest among the recent generations of priests with traditional devotional practices. Perhaps the most dramatic sign of the renewed fundamentalism has been the fascination with the Tridentine Liturgy. Named after the Council of Trent, it includes the rituals for the Mass and other religious celebrations as they were practiced between that Council (sixteenth century) and the Second Vatican Council (1962). The restored liturgical usage, celebrated entirely in Latin, is symbolic of all that the old Church was and is no longer. The use of this liturgy had been forbidden when it was replaced with the revised rituals after the Vatican Council. It was only used by the small schismatic sects, especially the followers of Archbishop Lefebvre.

In a remarkable reversal, Pope Benedict XVI officially restored the old rite in 2007. It has not supplanted what has been the standard

liturgy of the Church since the sixties but it stands now as an accessible alternative. Along with the restored Latin rituals has been the return of the elaborate liturgical vestments and clerical robes that had either been officially dropped or had simply gone out of style. The more informal and less regal manner of interacting with bishops, archbishops, and cardinals has been replaced with the anachronistic courtly practices of the past which likened the hierarchy more to princes than pastors. With the return of the exterior trappings has come a new strain of narrow authoritarianism displayed by bishops who react with harsh denunciations, bombastic rhetoric, and punitive measures in place of dialogue. The paradigm is changing and those with the greatest stake in it are reacting by surrounding themselves with the signs and symbols of the power and deference that is rapidly eroding. They are powerless to stop the change so the alternative is to create the illusion of the days of the Church Triumphant.

Like other fundamentalisms, the Catholic brand is marked by self-righteousness, excessive authoritarianism, anger at those who challenge it, and an obvious retreat to a mythological golden age. Those who appeal to a fundamentalist Catholicism rest their case on a belief that the authority of the pope and bishops as well as the monarchical structure are all of divine origin. The entire fundamentalist construct is supported by the Church's legal system, which provides a clear expression to these beliefs. The irony of the overall fundamentalist phenomenon is that those most disturbed and threatened by the paradigm shift are retreating to the trappings of the Church triumphant while in reality the influence and power symbolized by the rituals and robes is visibly eroding.

The structural deficiencies of the canonical system and of the practice of church governance have been laid bare by the institutional Church's response to the worldwide sexual scandal. Herein lies the fundamental basis for the hypocrisy of this response: the gospels demand a just and compassionate response to the very victims of the Church while the institutional church lays claim to a divinely given mandate to protect its structures above all else.

Catholic fundamentalism is a destructive reaction to the failure of the institutional Church to respond in a constructive and healing way to the many changes it has been challenged with in the modern age. Above all, this fundamentalism symbolizes the inability of the ruling elite of the Church to respond to its greatest challenge, the scandal of clergy sexual abuse.

The organizations that thrive on fundamentalist attitudes appear to enjoy an unprecedented favor with the Church authorities at

the highest levels. This same authority has not only tolerated but welcomed the return of the rituals and trappings of the imperial Church. At the same time these same authorities, relying on an ineffective canonical system, are perplexed to the point of paralysis by the problems of its own making.

Although Catholic fundamentalism has its pseudo-foundation in Canon Law and gives the impression of being on the ascendance due to the apparent patronage of the pope and several high-ranking Vatican officials, it remains fundamentalism. Beneath the elaborate vesture, the Gregorian chant and the mystical rituals, there is a fear and anger that can never benefit Catholicism. I would end with a quote from theologian Richard McBrien:

> Fundamentalism, on the other hand, is neither necessary nor constructive. Working out of an absolutist perspective, it sees the world as filled with evil forces conspiring against everything that it regards—with unquestioned certitude—as true and good.[50]

NOTES

1. See Patrick Arnold, S.J., "The Rise of Catholic Fundamentalism," *America* (April 11, 1987): 297–302. Also, Richard McBrien, "Fundamentalism: The Real Problem in any Religion," *The Tidings* (September 24, 2004) at http://www.the-tidings.com/2004/0924/essays_text.htm.
2. William D. Dinges, "Roman Catholic Traditionalism and Activist Conservatism in the United States," in Martin Marty and R. Scott Appleby, ed., *Fundamentalisms Observed* (Chicago, The University of Chicago Press, 1991): 86–87.
3. See ibid, 66–101 for a more detailed history of the schismatic traditionalist movements.
4. The Tridentine liturgy was restored by the Apostolic Letter *Summorum Pontificum*, July 7, 2007.
5. For a reliable account of Maciel and the Legionnaires, see Jason Berry and Gerald Renner, *Vows of Silence* (New York, Free Press, 2004).
6. Richard Holloway, "The Church Organist and the Jazz Pianist," in Robert Miller, ed., *The Future of the Christian Tradition* (Santa Rosa, CA, Poleridge Press, 2007): 93–104. This is a fascinating essay applying paradigm theory to organized Christianity.
7. The list is long but among the more prominent are John Courtney Murray, S.J., Yves Congar, O.P., Hans Kung, Bernard Haring, C.S.S.R., Henri de Lubac, S.J., Edward Schillebeeckx, O.P., Karl Rahner, S.J., and Jean Danielou, S.J.

8. Josef Ratzinger with Vittorio Messori, *The Ratzinger Report: An Exclusive Interview on the State of the Church* (San Francisco, CA., Ignatius Press, 1985): 30.
9. Mary Jo Weaver and R. Scott Appleby, ed. *Being Right* (Bloomington, Indiana, Indiana University Press, 1995), Introduction, p. ix.
10. Nicholas Atkin and Frank Tallett, *Priests, Prelates and People: A History of European Catholicism since 1750* (Oxford, Oxford University Press, 2003): 265.
11. The most accurate account of the unfolding of the sex abuse scandal is Jason Berry, *Lead Us Not Into Temptation* (New York, Doubleday, 1992).
12. The bibliographic list is extensive. See my own bibliography on www.richardsipe.com.
13. Marci Hamilton, *God vs. The Gavel* (Cambridge, Cambridge University Press, 2005): 3.
14. Pascal Boyer, *Religion Explained* (New York, Basic Books, 2001): 5.
15. Ibid., 23.
16. Tom Inglis, *Moral Monopoly* (Dublin, University College Press, 1998): 83.
17. John Whyte, *Church and State in Modern Ireland, 1923–1970* (Dublin, Gill and Macmillan, 1971): 249.
18. Numerous scholars dispute the theory of a divine origin of the Church. See for example, Hans Kung, *The Catholic Church: A Short History* (New York, The Modern Library, 2003): 21–23.
19. This reflects the famous saying of former Chief Justice Charles Evans Hughes who once said, "We are under a constitution but the constitution is what the judges say it is."
20. Stanley Perry, *St. Thomas Aquinas Treatise on Law* (South Bend, IN, Gateway Publications, no date). See p. 38, which cites the *Summa Theologiae* of St. Thomas, Quest. 93. See also Dino Bigongiari, ed., *The Political Ideas of St. Thomas Aquinas* (New York: Hafner Press, 1954): 3–11.
21. *The 1917 or Pio-Benedictine Code of Canon Law*, English trans. Edward Peters (San Francisco, Ignatius Press, 2001), Preface: 2.
22. Anders Winroth, *The Making of Gratian's Decretum* (Cambridge, Cambridge University Press, 2000): 2.
23. Apostolic Constitution, *Sacrae Disciplinae Leges*, Pope John Paul II, January 25, 1983 in *The Code of Canon Law: A Text and Commentary*, ed. James Coriden, Thomas Green, and Donald Heintschel(New York, Paulist Press, 1985): xxv.
24 This title was assumed for the papacy by Pope Gregory VII (d. 1095). Peter de Rosa, *Vicars of Christ* (Dublin, Poolbeg Press, 2000): 66. "Only 'Vicar of Christ' could satisfy his absolutist pretensions, which his successors inherited in reality but not from Peter or from Jesus, but from him [Pope Gregory VII]."

25. *The Code of Canon Law* (Washington, D.C., Canon Law Society of America, 1983): canon 331, p. 119.
26. Donald Wuerl, "Reflections on Government and Accountability in the Church," in *Governance, Accountability and the Future of the Catholic Church,* ed., Francis Oakley and Bruce Russett (New York, Continuum, 2004): 13: "The Catholic Church was established by Christ and its structure is articulated in two sacraments: baptism and orders. The hierarchy and the apostolic tradition are intrinsic to the Church."
27. *Code of Canon Law*, canon 204, 2: "This Church, constituted and organized as a society in this world, subsists in the Catholic Church, governed by the successor of Peter and the bishops in communion with him."
28. Ibid., canon 331: "The bishop of the Church of Rome [a traditional title of the pope], in whom resides the office given in a special way by the Lord to Peter, first of the Apostles and to be transmitted to his successors, is head of the College of Bishops, the Vicar of Christ and the pastor of the universal church on earth; therefore in virtue of his office he enjoys supreme, full, immediate and universal ordinary power in the Church, which he can always freely exercise." Canon 333 states that this power applies to the universal church and also to individual divisions of the Church.
29. On the repression directed through the Congregation for the Doctrine of the Faith, see Paul Collins, *God's New Man* (London & New York, Continuum, 2005), Chapter 8, "Prefect of the CDF," p. 169–92.
30. Canon 1404: "The First See [the office of pope] is judged by no one."
31. Hans Kung, *The Catholic Church: A Short History* (New York, The Modern Library, 2003): 3, 8–9, 10, 21.
32. Gospel of St. Luke, 22:26.
33. Huguccio, also known as Hugh of Pisa, died in 1210. He wrote numerous commentaries on the law including his *Summa* on the *Decree of Gratian* (1187).
34. Hugiuccio, *Summa,* Glossa ordinaria ad Distinctionem 19, c.9, 80. See also J. Watt, "The Early Medieval Canonists and the Foundations of Conciliar Theory," in *Irish Theological Quarterly* 24(1957):. 13–31.
35. Thomas Aquinas, *Summa Theologiae*, Prima secundae, q. 105, ad 1.
36. Brian Tierney, "Church Law and Alternative Structures," in *Governance, Accountability and the Future of the Catholic Church,* ed. Francis Oakly and Bruce Russett (New York: Continuum, 2004): 51.
37. Gerard Noel. *Pius XII: The Hound of Hitler* (London, Continuum, 2008): Chapter 2, "The Design Unfolds", pp. 15–17.
38. Tierney, "Church Law and Alternative Structures," 61. For comparison see "Innocent III, Lord of the World" in Peter De Rosa, *Vicars of Christ,* 66–68.

39. Paul Collins, *God's New Man* (London, Continuum, 2005), 48.
40. Feb. 11, 1906. The full text is available at the Vatican website. http://www.vatican.va/holy_father/pius_x/encyclicals/documents/hf_p-x_enc_11021906_vehementer-nos_en.html.
41. Karl Rahner, ed. *Encyclopedia of Theology: The Concise Sacramentum Mundi* (New York, Seabury Press, 1975): 615.
42. Hans Kung, *The Catholic Church: A Short History* (New York, The Modern Library, 2003): 9.
43. Apostolic Constitution *Providentissima Mater Ecclesia*, May 27, 1917, Pope Benedict XV in Edward Peters, curator, *The 1917 Pio-Benedictine Code of Canon Law* (San Francisco, Ignatius Press): 21.
44. See Reese Dunklin and Brooks Egerton, *Dallas Morning News*, October 22, 2002. Archbishop Tarcisio Bertone, then secretary to the Congregation for the Doctrine of the Faith, which was presided over by Cardinal Ratzinger, now Pope Benedict XVI, and Archbishop Julian Herranz, President of the Pontifical Commission for Legislative texts both made public statements to the effect that bishops are not required to report sexual abuse to secular authorities since accused priests should be handled by Church processes. Both men are now Cardinals. Bertone is archbishop of Genoa and Herranz retained his Vatican office.
45. T. Lincoln Bouscaren, Adam Ellis, and Francis Korth, eds., *Canon Law: A Text and Commentary* (Milwaukee, Bruce Publishing, 1963): 106 and 925.
46. William McCall, Associated Press in *Corvallis Gazette-Times*, January 8, 2006, "The leader of the Roman Catholic Archdiocese of Portland says the church will follow its own law on ownership of its property despite a ruling by a federal bankruptcy judge declaring it potentially subject to sale to satisfy claims by victims of alleged priest sex abuse."
47. John Paul II, Letter to the American Bishops, June 11, 1993 in *Origins*, July 1, 1993, Vol. 23, no. 7.
48. The Pew Forum on Religion and Public Life, *U.S. Religious Landscape Survey* (Feb. 2008): 5–6. Available at http://religions.pewforum.org/pdf/report-religious-landscape-study-full.pdf.
49. Jerry Filteau, "U.S. Catholic Population Up. Most Other Church Data Down," *The Tidings,* July 7, 2006, http://www.the-tidings.com/2006/0707/population.htm.
50. Richard McBrien, "Fundamentalism: The Real Problem in Any Religion," *The Tidings,* September 24, 2004. www.the-tidings.coml2004/0924/essays_text.htm.

Chapter 10

Secrecy and the Underpinnings of Cycles of Child Sex Abuse in Religious Organizations*

Marci A. Hamilton

There is one arena where the distinctions between fundamentalist and nonfundamentalist religions are not profound: child sex abuse. Sadly, both have worked in strikingly similar ways and embraced religious beliefs that operated to the benefit of the organization but to the detriment of children. While the country, and the world, has been captivated by the Catholic Church scandal in the past decade, evidence is mounting that policies of secrecy contributing to serial abuse are not limited to the Roman Catholic Church (RCC). Religious communities have been placed on a pedestal that permitted them to persuade the rest of society to let them handle their problems internally. We now know this hands-off policy is not safe for the vulnerable. This chapter examines the beliefs mandating secrecy, which have created and perpetuated cycles of child sex abuse within mainstream and fundamentalist religions.

I. Practices and Doctrines of the Roman Catholic Church That Have Entrenched a Cycle of Child Sexual Abuse

The most widely reported rule of secrecy is the Catholic Church's rule against "scandal" in front of outsiders, which forbids clergy and believers

from embarrassing the Church.[1] One theory is that it was instituted to ensure that the misdeeds of clergy would not lead parishioners astray.[2] It is also intended to protect the Church's image from being besmirched by the actions of fallible men.[3] Whether it is for the benefit of believers or image, it operates to keep the facts of abuse and inappropriate behavior from outsiders. In 2010, as the world learns of an ever-increasing number of instances of child sex abuse by clergy, the rule against scandal is regularly invoked, both explicitly and implicitly.[4]

In letters from the Holy See during the twentieth century, the rule against scandal was explicitly established with respect to child sex abuse:[5] the named delicts (or church crimes) including sex with minors were exclusively "reserved to the apostolic tribunal of the Congregation for the Doctrine of the Faith" and "[c]ases of this kind are subject to the pontifical secret."[6] The 1962 incarnation of the policy[7]—the *Crimen sollicitationis*—of the Holy See's secrecy policy states:

> [E]ach and everyone pertaining to the tribunal in any way or admitted to knowledge of the matters because of their office, is to observe the strictest secret . . . in all matters and with all persons, under the penalty of excommunication latae sententiae, ipso facto and without any declaration [of such a penalty] having been incurred and reserved to the sole person of the Supreme Pontiff, even to the exclusion of the Sacred Penitentiary, are bound to observe [this secrecy] inviolably.[8]

From the title *Crimen sollicitationis*, it may appear that secrecy was still limited in this context to misdeeds solicited in the confessional, but the instructions of the 1962 document encompassed all sexual misdeeds by a priest, including child sex abuse.[9] Everyone involved was sworn to secrecy. The victim (called the "solicited penitent") was required to denounce the perpetrator within a month of the act and then observe secrecy as well:

> The obligation of denunciation on the part of the solicited penitent does not cease because of a spontaneous confession by the soliciting confessor done by change, not because of his being transferred, promoted, condemned, or presumably reformed and other reasons of the same kind. It ceases, however, at his death.[10]
>
> . . .
>
> In receiving the denunciations, this order is to be regularly observed: First, an oath to tell the truth while touching the Holy Gospels is to be given to the person making the denunciation; he should be interrogated according to the formula, circumspectly, so that he narrates each and every circumstance briefly, indeed, and decently, but

> clearly and distinctly, pertaining to the solicitations he has suffered. . . . And before he is dismissed, there should be presented to him, as above, an oath of observing the secret, threatening him, if there is a need, with an excommunication reserved to the Ordinary or to the Holy See.[11]

The requirement and role of secrecy in RCC clergy abuse cases has been confirmed in the United States cases, where bishops have kept "secret archives," which contained probative information on abusing priests.[12] The secrecy requirements have meant that any steps taken by the hierarchy to stop abuse by any single priest have been limited to their internal universe, for example, forbidding the priest from working with children or assigning other priests to watch over them within the organization. Perpetrators routinely have circumvented such measures and continued to abuse children over the course of their lives.[13] When the abuser moved on to more children, the institution followed the same nonpublic practices, and a trapped cycle was instituted. The more children abused, the worse the scandal would be for the Church if the abusing priest's identity were publicly disclosed. Over time, then, the scandal-avoiding justification for the cover-up became ever more powerful with each additional victim coming forward. The *Crimen Sollicitationis* remained in effect and was the policy of the RCC until 2001,[14] although its very nature was so shrouded in secrecy that by the end of the twentieth century, the name of this document was unknown to many of the very bishops[15] who enforced its edicts.[16] Procedures changed somewhat after 2001, but not the principle that public disclosure was to be avoided. As Professor Fr. Hans Kung has explained:

> There is no denying the fact that the worldwide system of covering up cases of sexual crimes committed by clerics was engineered by the Roman Congregation for the Doctrine of the Faith under Cardinal Ratzinger (1981–2005). During the reign of Pope John Paul II, that congregation had already taken charge of all such cases under oath of strictest silence. Ratzinger himself, on May 18th, 2001, sent a solemn document to all the bishops dealing with severe crimes ("*epistula de delictis gravioribus*"), in which cases of abuse were sealed under the "*secretum pontificium*", the violation of which could entail grave ecclesiastical penalties. With good reason, therefore, many people have expected a personal mea culpa on the part of the former prefect and current pope.[17]

Even if it had other intentions, the Church's embrace of the rule against scandal hampered its ability to stop the abuse by making it impossible to bring in outsiders like prosecutors or state child-service

agencies. Thus, an intentional cycle was created and entrenched. Some would argue that these problems are linked to a movement toward fundamentalism in the Catholic Church.[18] Either way, the Catholic Church is hardly alone in having this particular problem.

II. THE MORMONS AND FUNDAMENTALIST MORMONS, AND THE BELIEFS AND CONDUCT THAT HAVE CONTRIBUTED TO CYCLES OF CHILD SEX ABUSE

During the nineteenth century, the Church of Jesus Christ of Latter-Day Saints (LDS or Mormon) instituted religiously motivated polygamy. By the end of the century, though, the LDS repudiated the practice, which created a schism. Fundamentalists continued to hold the belief that polygamy is religiously required while the mainstream LDS has totally abandoned the practice. The Fundamentalist Church of Jesus Christ of Latter-Day Saints (FLDS) thus shares roots with the LDS. Though there are exceptions, religiously motivated polygamy tends to elevate men to positions of nearly absolute power, demean and disable women, and harm and exploit children.[19] Those are not problems for the LDS, but for both, child sex abuse has been an issue exacerbated by secrecy.

A. Historical Background

There are a number of fundamentalist polygamist groups whose history traces back to the early decades of the Church of Jesus Christ of Latter-Day Saints Church (LDS).[20] While the LDS Church practiced polygamy for some decades during the nineteenth century, its leaders issued two later manifestoes that, first, rejected the practice,[21] and, second, instituted excommunication for those who continued to engage in polygamy.[22] A small number of Mormons, though, rejected these new revelations and continued to practice polygamy in Mexico and the United States,[23] and later Canada.[24]

Laws against polygamy were in place well before the United States was founded,[25] and existed in every state during the nineteenth century through today.[26] These anti-polygamy laws blanketed the states well before Congress took up the Edmunds-Tucker Act of 1887, which extended the ban on polygamy to the Utah Territory (and all territories under the jurisdiction of the United States) before the states in those areas were established.[27] There was strong anti-polygamy sentiment, and, therefore, when the LDS embraced the practice, it was

roundly condemned. None of the anti-polygamy laws, though, were directed solely at any particular religious group, but were applicable to all who engaged in polygamy, secular or religious.[28]

When the United States Supreme Court was asked to rule on whether there is free exercise protection for polygamy, it rejected the claim and described polygamy as a violation of historical practices and equality between the sexes:

> [P]olygamy leads to the patriarchal principle, and which, when applied to large communities, fetters the people in stationary despotism, while that principle cannot long exist in connection with monogamy. . . . An exceptional colony of polygamists under an exceptional leadership may sometimes exist for a time without appearing to disturb the social condition of the people who surround it; but there cannot be a doubt that, unless restricted by some form of constitution, it is within the legitimate scope of the power of every civil government to determine whether polygamy or monogamy shall be the law of social life under its dominion.[29]

The Court thus acknowledged that while there might be instances of polygamy that do not result in oppression; in the main, the practice tends to generate severe harm to women and children. The United States' laws against polygamy have been upheld repeatedly.[30] Polygamous practices have contributed to a significant amount of child sex abuse within the FLDS, but secrecy in both the LDS and FLDS has led to dangerous conditions for children.

B. The Religious Beliefs and Conduct that Have Contributed to Child Sex Abuse in Mormon and Fundamentalist Mormon Communities

The Fundamentalist Mormons still view the LDS Church as the true church, though its leaders abandoned the mandate of polygamy.[31] Thus, there are beliefs and practices within the LDS Church that cast light on FLDS practices. They also shed light on the origins of the hidden child sex abuse that has occurred within the LDS Church itself and echo some of the practices within the RCC.[32]

Principles from the Mainstream Mormon Church

The LDS has struggled with abuse within its ranks.[33] The LDS describes a relatively enlightened process for child sex abuse victims on its website,[34] but it is not as effective as it may seem upon first reading. A survivor of abuse, whose siblings were also abused, describes

> denial and concealment that child abuse exists within [the] organization . . . [there is] a developed culture whereby child sexual abuse can flourish, and such culture continues to the present day. In our case, we told our Bishop and Stake President about the abuse at the time, and they did absolutely nothing about it. They did not excommunicate or even sanction our abuser. Rather, they did nothing to him, and did nothing about the abuse. Unfortunately, the monster was abusing one of my best friends too, and nobody knew it. The abuse was "handled" solely by the untrained Mormon clergy and was NEVER reported to civil authorities or to others trained and equipped to handle such situations. We never received the necessary help, counseling, or follow up. As a result, the abuse continued after the Mormon Church received the abuser's confession.[35]

The LDS employs principles and legal tactics that can impose barriers to victims to obtain justice and to the authorities to aid in the cessation of abuse. Unlike the Catholic Church, the LDS has a less hierarchical order, and mostly lay leadership, but that does not mean children are necessarily safer. According to the Supreme Court of Utah:

> In the LDS Church, a bishop is the ecclesiastical leader of a local congregation called a "ward." A group of wards make up a "stake," which is headed by a stake president. Bishops and stake presidents are ordained to their offices by those higher in the church hierarchy. A bishop's and stake president's duties include giving spiritual guidance and counsel to the members of the Church in their jurisdiction. They receive no formal educational training as clergymen, are not compensated by the Church, and perform their ecclesiastical duties in addition to their vocations.[36]

Those defending the Church have argued that the LDS Church cannot be compared to the RCC, because the LDS has no professional clergy. This distinction, however, is not one that guarantees greater child safety. The number of untrained laypersons may increase the danger for vulnerable children, because the leaders are rightly occupied with their own families and full-time careers and because they are not as well-versed in the issue. This is especially true, because it appears that the highest levels of the leadership do not always share information about the existence of abuse with them.

LDS texts establish beliefs and practices that also can function to keep child sex abuse secret. First, like the RCC hierarchy's purpose of avoiding public "scandal," there is a commitment to keep the image of the LDS Church pure. There is a belief that "[i]t is our great mission . . . to be a standard to all the world."[37] Achieving this goal in a disciplinary context requires measures that "safeguard the purity, integrity, and good

name . . . or moral influence of the Church."[38] The Church's image, therefore, is a driving force permeating the faith.

LDS leaders are discouraged from cooperating in cases involving abuse as detailed in the 1998 Church Handbook of Instructions, which states explicitly:

> To avoid implicating the Church in legal matters to which it is not a party, leaders should avoid testifying in civil or criminal cases reviewing the conduct of members over whom they preside. A leader should confer with the Church's Office of Legal Services or the Area Presidency:
>
> 1. If he is subpoenaed or requested to testify in a case involving a member over whom he presides.
> 2. Before testifying in any cases involving abuse.
> 3. Before communicating with attorneys or civil authorities in connection with legal proceedings.
> 4. Before offering verbal or written testimony on behalf of a member in a sentencing hearing, parole board hearing, or probationary status hearing.
>
> Church leaders should not try to persuade alleged victims or other witnesses either to testify or not to testify in criminal or civil court proceedings.[39]

These standards were updated in 2006, with the removal of the direct reference to "abuse" and elimination of the list format:

> To avoid implicating the Church in legal matters to which it is not a party, Church leaders should avoid testifying in civil or criminal cases reviewing the conduct of members over whom they preside. In the United States and Canada, a leader should confer with the Church's Office of General Counsel if he is subpoenaed, is considering testifying in a lawsuit, is asked to communicate with attorneys or civil authorities regarding legal proceedings, or is asked to offer verbal or written testimony. Outside the United States and Canada, leaders should contact the administration office to obtain local legal counsel in these situations. [. . .] Church leaders should not try to persuade alleged victims or other witnesses either to testify or not to testify in criminal or civil court proceedings.[40]

Second, while there is no hierarchy in the sense of a monarchy, the leadership is made up of "prophet[s]," said to "speak for God."[41] These first two principles have situated the Church and its leaders as barriers between victims and perpetrators and legal authorities.

The members may not fully understand this, as guidelines that are provided to the leadership may not be distributed to the members.

Third, believers are required to be obedient to the commands of the prophets, and if they are obedient, "[g]reat [b]lessings [f]ollow."[42] "When a prophet speaks for God, it is as if God were speaking."[43] Members are told to do that which the prophets tell them to do, because a "prophet will never be allowed to lead the Church astray."[44] Therefore, believers "should follow his inspired teachings completely."[45] In 1996, then LDS Church President Gordon B. Hinckley advised Mormon college students to think for themselves, but also to avoid criticizing church leaders. "You have been taught to think critically, to explore, to consider various sides of every question. This is all good," he said. "But you can do so without looking for flaws in the church or in its leaders."[46]

Like the RCC hierarchy, Mormon leaders have followed rules that tend to keep abuse cases internal and secret. "Church leaders should be sensitive to such [abuse] victims,"[47] but the primary focus of the Handbook section on "Abuse and Cruelty" revolves around how to handle the perpetrator: he or she is required to be disciplined within the Church, but later may be "restored to full fellowship or readmitted by baptism and confirmation."[48] If either need counseling, leaders and bishops are supposed to call LDS Family Services, so that counseling will be "in harmony with gospel principles."[49] The strongest suggestion regarding reporting abuse requires urging an *abuser* to turn him or herself in to civil authorities.[50] There is an implicit acquiescence to reporting of abuse to the authorities by the leadership *if* there is mandatory reporting in the state, but no directive.[51] If reporting is legally mandated, the leader is required to "encourage the [abusing] member to secure qualified legal advice."[52] The Church also argues in the courts that there should be a broad "confessional privilege," which relieves Mormon leaders and lay clergy from having to report knowledge of abuse,[53] and they have filed briefs in clergy abuse cases arguing that the First Amendment limits the institution's obligation to the law.[54] Finally, victims who came forward against members have been ostracized. One survivor states: "[W]hen I confessed it and all the abuse I had been subjected to, I was made to feel like I was victimizing my abusers."[55]

Practices Within the FLDS

The fundamentalist polygamist groups are less devoted to securing a pure public image, no doubt because they are knowingly engaging in a great deal of illegal conduct (from polygamy to statutory rape to child abandonment), but they observe with fervor the LDS principles of deference to leaders, as well as the disinclination to

involve legal authorities or other outsiders in cases of abuse. The fundamentalist communities that split off from the LDS Church in order to sustain their beliefs in divinely mandated polygamy have followed strict patriarchal principles. Their leaders have fought each other for control and have asserted either that they are God, or have the most direct relationship with God.[56] Warren Jeffs—now incarcerated for a series of charges involving statutory rape and child abuse—is the most notorious polygamous sect prophet in recent years.[57] He has demanded complete control of families and directed which men would have which women and girls, and even has broken up marriages and families to rearrange them to his edicts.[58] Secrecy has been central to the FLDS's practices, and has been furthered by prohibitions on filing birth or death certificates,[59] obtaining medical care outside their enclaves,[60] and reporting child sex abuse or statutory rape to outside authorities.[61] The result has been entrenched and widespread child sex abuse, statutory rape, and child bigamy within the organization.[62]

In order for the men to have numerous brides, they have drawn from girls and adolescents,[63] and they have discarded rebellious boys.[64] While these practices have been widespread, there have been relatively few prosecutions,[65] in part because so much of the abuse occurs under mandatory layers of secrecy.

These rules against scandal pervade many religions—not just the Catholic or Mormon Churches—and operate to harm children and vulnerable adults wherever they exist. The same phenomenon exists in the Jewish world.[66] Indeed, the ultra-Orthodox Jewish community has enforced its rule against scandal vigilantly, and successfully until very recently.[67] Now, there is an ongoing debate among Orthodox rabbis regarding the appropriateness of telling the authorities about child sex abuse, with some adhering to the rule against scandal while others propose sending the information through inside channels and only then to the authorities.[68] This was the approach that the RCC crafted at its Dallas meeting following the Boston Globe's revelations.[69] The problem is not limited to traditional religious organizations per se, either, as the Boy Scouts, a boys club grounded in religious precepts, also has similar issues.[70]

The Common Characteristics of Religious Secrecy Beliefs and Practices that Place Children at Risk

Whether or not the organization is fundamentalist, children are endangered by beliefs that child sexual abuse should be kept within

an organization. Religious organizations have instituted rules of secrecy and/or isolation that have fostered entrenched cycles of child sex abuse or created barriers to victims who seek justice. These rules operate primarily to sequester information and to block the flow of information from moving to the outside. They have certain common characteristics. First, they impede information from reaching (1) law enforcement; (2) state agencies and lawmakers; (3) the media (including news coverage, commentary, and widely viewed and influential talk shows); (4) other nonprofit organizations, social leaders, and philanthropists who might otherwise take action for the victims; and (5) the public, which might well demand prosecutorial action and legal reform if they knew the facts. With the information stopping at the edge of the religious organization, the public has little chance of learning of the existence of the criminal or tortious behavior. This means that the ability of outsiders to stop abuse and protect the children—even when those outsiders are charged with punishing, deterring, or monitoring abuse—is stymied before their social and public roles can be fulfilled.

Second, such rules can block the information flow between believers within the organization. The way the rule typically operates, the information is shared with as few people as possible even within the organization. Thus, in the RCC, at least until the *Boston Globe* series documented an intentional cover-up,[71] there does not appear to have been open sharing of information between priests about the abusive practices of their fellow priests, and there was even less sharing of information with parishioners. This means that even insiders, who are the most invested in the organization's reputation and future, lack the information necessary to stop the abuse. In addition, if there are isolated leaks of information, as there were with respect to priests abusing children in the 1980s,[72] the rule against scandal keeps the flow of information to a trickle, so that insiders and outsiders cannot put the pieces of the puzzle together.

The rule against scandal is not just a regulation of information, however. It is also an important means by which religious leaders maintain power over their flocks and in the larger community. When bad behavior (especially when it has a criminal element) may only be addressed in-house, the leadership's role of spiritual advisor expands to encompass judge, jury, and/or case worker. That does not mean they take on all of the functions of these social actors, but rather that they displace them. That not only enhances their standing in their own communities, but also puts them in a quasi-omniscient position.[73] This perversion is exemplified by the 2002 remarks of Cardinal Tarcisio Bertone, who

was then Secretary of the Congregation for the Doctrine of the Faith, and later became Papal Secretary of State:

> In my opinion, the demand that a bishop be obligated to contact the police in order to denounce a priest who has admitted the offense of pedophilia is unfounded. [. . .] Naturally civil society has the obligation to defend its citizens. But it must also respect the "professional secrecy" of priests, as it respects the professional secrecy of other categories, a respect that cannot be reduced simply to the inviolable seal of the confessional.[74]

The rule against scandal makes the vulnerable even more vulnerable because even when the story starts to spread more widely within the group, coreligionists often place their role as believer above their public role. For example, a prosecutor might refuse to investigate or prosecute coreligionists even though his role otherwise would demand such actions.[75] A recent confirmation of this reality involved Justice David T. Prosser, Jr., of the Wisconsin Supreme Court. When he was a prosecutor, parents learned of their child's abuse by a priest and intended to press charges.[76] Prosser, accompanied by a deacon and another member of the parish, went to the family's home to urge the parents not to publicly embarrass the RCC.[77] They succeeded.[78]

Clergy may also impress outsiders into observing the rule. It is common knowledge that prosecutors across the country, whether coreligionists or not, received reports regarding sexual abuse by Catholic priests, and when approached by the local bishop, agreed to let the diocese handle its own "dirty laundry."[79] Prosecutors apparently assumed that they were hearing about isolated events, not a church-wide, mandated process for handling abuse secretly. Their lack of information was attributable to the relative success of the rule against scandal; prosecutors simply did not have the quantum of information needed for them to suspect the larger, insidious pattern.[80] Alternatively, prosecutors saw a pattern but believed in the social myth that religious entities are well-equipped to handle the suffering of anyone hurt, including those sexually abused.[81] Similarly, numerous news sources abetted the rule against scandal when the bishops pressured them to keep the abuse and the bishops' knowledge of the abuse confidential. Even today, religious groups try to quiet media coverage of their involvement in sexual abuse by clergy by charging the press with anti-religious bias.[82] Before the more persistent media coverage, such a tactic could be quite successful and religious groups could keep a lid on their internal struggles with child abusers.

The more the public has been educated, the less willing society has been willing to be a partner in the cover-up.

CONCLUSION

In the sexual abuse context, attention to the nature of the harm will go farther to protect children than examining the nature or identity of the religious group. The phenomenon this Chapter has explored is the use of a rule against scandal within religious organizations that perpetuates and fosters abuse. While religious organizations deserve space within which to choose their religious leaders and share common beliefs, harmful and illegal actions do not and should not fall within the penumbra of protected religious activities. As longtime political reporter and *Face the Nation* host, Bob Schieffer, put it: "How the church organizes itself, whether priests should marry and so on, is the church's business not mine. But child abuse is everyone's business."[83] The secrecy that surrounds child sex abuse within religious organizations (and elsewhere in society) must be stripped away before children can be safe. That means society needs to remove the blinders that shield the criminal and tortious behavior within both fundamentalist and mainstream religious organizations. It also requires the enactment of laws that penalize hiding child sex abuse in any organization,[84] creation of more opportunities for victims to come forward,[85] and the adoption of a religious liberty doctrine that does not protect the perpetrators or the institutions that create the conditions for abuse.[86] These are the legal antidotes to the poisonous secrecy that has trapped children in cycles of abuse.

NOTES

* Elements of this chapter were previously published in the *William and Mary Bill of Rights Law Journal*. Marci A. Hamilton, "The 'Licentiousness' in Religious Organizations and Why It is Not Protected Under Religious Liberty Constitutional Provisions," *William & Mary Bill of Rights Journal* 18 (forthcoming 2010).

1. Marci A. Hamilton, "The Rules Against Scandal and What They Mean for the First Amendment's Religion Clauses," *Maryland Law Review* 69 (2009): 119.
2. Ibid. at 122.
3. Ibid. at 123.
4. Laurie Goodstein and Michael Luo, "Pope Put Off Punishing Abusive Priest," *New York Times*, sec. A (April 10, 2010); Jay Weaver,

"Lawyers Claim Vatican Knew About Troubled Past' of Former Miami Priest," *Newsoberver.com* (March 29, 2010), http://www.newsobserver.com/2010/03/29/413474/lawyers-claim-vatican-knew-about.html; Carrie Antflinger, "The Vatican Ripped for its Handing of Wisconsin Abuse Scandal," *Associated Press* (March 29, 2010), http://www.greenbaypressgazette.com/article/20100329/GPG0101/100329082/1207/GPG01/Update--Vatican-ripped-for-its-handling-of-Wisconsin-abuse-scandal; Jonathan Wynne-Jones, "Catholic Church Decided Not to Unfrock Priest Who Abused Deaf Boys," *Telegraph.co.uk* (April 10, 2010), http://www.telegraph.co.uk/news/newstopics/religion/7575106/Catholic-Church-decided-not-to-unfrock-priest-who-abused-deaf-boys.html; Sandro Contenta, "Vatican Knew of Abuse in Ontario," *The Star.com* (March 28, 2010), http://www.thestar.com/news/ontario/article/786550--vatican-knew-of-abuse-in-ontario-victim; Jay Weaver, "Lawyers: Vatican Knew About South Florida Priest's Past," *Miami Herald* (March 30, 2010), http://www.miamiherald.com/2010/03/29/1554330/suit-vatican-knew-about-priests.html; Agence France Presse, "Pope Accused In New Predator Priest Case," *Vancouver Sun.com* (March 30, 2010), http://www.vancouversun.com/news/Pope+accused+predator+priest+case/2744898/story.html.

5. See Cardinal Joseph Ratzinger, "De Delictis Gravioribus" (letter from the Congregation for the Doctrine of the Faith to all Bishops of the Catholic Church, Holy See, May 18, 2001), http://www.bishop-accountability.org/resources/resource-files/churchdocs/EpistulaEnglish.htm; Pope John Paul II, "Sacramentorum sanctitatis tutela" (Apostolic Letter, Holy See, April 30, 2001), http://www.bishop-accountability.org/resources/resource-files/churchdocs/SacramentorumAndNormaeEnglish.htm; Cardinal Alfredo Ottaviani, "Crimen sollicitationis" (letter from the Supreme Sacred Congregation of the Holy Office to all Patriarchs, Archbishops, Bishops and other Local Ordinaries of the Catholic Church, Holy See, March 16, 1962), http://www.bishop-accountability.org/resources/resource-files/churchdocs/CrimenEnglish.pdf.
6. Cardinal Joseph Ratzinger, "De Delictis Gravioribus;" see also Pope John Paul II, "Sacramentorum sanctitatis tutela" ("[Part Two: Procedural Norms, Title II] Art. 25, § 1. Cases of this nature are subject to the pontifical secret. § 2. Whoever has violated the secret, whether deliberately . . . or through grave negligence, and has caused some harm to the accused or to the witnesses, is to be punished with an appropriate penalty by the higher Turnus at the request of the injured party or even ex officio.").
7. A set of procedural norms very similar to those outlined in the *Crimen Sollicitationis* was apparently issued in 1922, although the contents of this document were shrouded in complete secrecy. Thomas J. Doyle,

"The 1962 Vatican Instruction 'Crimen Sollicitationis' Promulgated on March 16, 1962: Observations by Thomas Doyle, O.P., J.C.D.," November 1, 2006, ¶ 22.

8. Cardinal Alfredo Ottaviani, "Crimen sollicitationis," ¶ 11.
9. Thomas J. Doyle, "The 1962 Vatican Instruction 'Crimen Sollicitationis' Promulgated on March 16, 1962: Observations by Thomas Doyle, O.P., J.C.D.," ¶ 10. ("Title V of the document includes the crimes of sexual contact with same sex partners, sexual contacts with minors and bestiality which are also to be processed according to these special norms. The document does not imply that these crimes were to have been perpetrated through solicitation in the confessional. It included them under the title 'The worst crimes' and presumably because of their serious nature, they were included under these special procedural norms.")
10. Cardinal Alfredo Ottaviani, "Crimen sollicitationis,", ¶ 21.
11. Ibid., ¶ 23.
12. Ibid., intro ("[This text is] to be diligently stored in the secret archives of the Curia as strictly confidential. Nor is it to be published nor added to with any commentaries."); ibid., ¶ 70 ("[O]fficial communications shall always be made under the secret of the Holy Office; and, since they concern the common good of the church to the greatest degree, the precept of doing these things obliges under serious sin [sub gravi]."). See also ibid., ¶ 27–28:

> Any denunciation once accepted, the Ordinary is bound most gravely to communicate this as soon as possible to the promoter of justice who must declare in writing, whether the specific crime of solicitation in the first sense is present in the case or not, and whether the ordinary disagrees with this or not. [. . .]
>
> If, on the other hand, the Ordinary and the promoter of justice agree together, or in some way the promoter of justice does not make his recourse to the Holy Office, then the Ordinary, if he has decreed that the specific delict of solicitation was not present, should order the Acts to be put into the secret archives[.] . . . If, however, he believed that they were present, then he should proceed to the inquisition . . .

See also Thomas B. Scheffey, "Gratifying Moment for Firm that Took on Church," *Connecticut Law Tribune*, December 7, 2009 ("Canon law requires each diocese to have a secret archive, and only the bishop is to have access. The secret archives hold documents that would cause the diocese great embarrassment, such as alleged crimes by its priests."); Steven Church, "Secret List was Compiled, then Later Destroyed," *Wilmington News Journal*, November 20, 2005, http://bishopaccountability.org/news/2005_11_20_Church_SecretList.htm.

13. See Marci A. Hamilton, "Recent Developments Regarding Clergy Child Abuse: How They Reveal Both Good and Bad News About the Chances of Getting Justice for Abuse Survivors and Preventing

Future Abuse," *FindLaw*, September 18, 2008, http://writ.news.findlaw.com/hamilton/20080918.html ("Even after the bishops' reforms were adopted . . . [Cardinal] George has still consciously covered up the identities of current abusers in his jurisdiction[.]"); Niall O'Dowd, "The Truth about the Bishops and Notre Dame," *Irish Voice*, April 29, 2009, http://www.irishcentral.com/story/news/periscope/the-truth-about-the-bishops-and-notre-dame-78712457.html ("[Cardinal] George put himself forward as a major opponent of the pedophile priest rings, until it was revealed that he too had covered up for one of his own priests[.] . . . Father Daniel McCormick was allowed to stay in his church even though George knew that serious allegations had been filed against him.").

14. Thomas J. Doyle, "The 1962 Vatican Instruction 'Crimen Sollicitationis' Promulgated March 16, 1962," ¶ 6.
15. Ibid., ¶ 8. ("It is known as an 'Instruction,' and was sent to every bishop in the world; yet detailed awareness of its contents has been limited. In fact it is probably accurate to assume that the majority of bishops in today's church as well as the majority of canon lawyers, were probably unaware of the Instruction's existence until it was mentioned in the recent Letter on dealing with More Grave Delicts, issued by the Congregation for the Doctrine of the Faith, May 18, 2001 (Sanctitatis Sacramentorum Tutela). . . . Nevertheless the secrecy under which the document was originally distributed has possibly resulted in such restricted awareness.")
16. Ibid., ¶ 19. ("Though the document may have been unknown to many in Church authority positions in recent years, there is documentary evidence that it was used in the prosecution of cases of clergy sexual misconduct in the past. Several clergy files from dioceses around the country have contained documents which referenced Crimen Sollicitationis.")
17. Fr. Hans Kung, "Church in Worst Credibility Crisis Since Reformation, Theologian Tells Bishops," *Irish Times,* April 16, 2010 (open letter from theologian Hans Küng to all Roman Catholic bishops), http://www.irishtimes.com/newspaper/opinion/2010/0416/1224268443283.html.
18. James Carroll, "Rescue Catholicism From Vatican," *Boston Globe*, April 5, 2010, http://www.boston.com/bostonglobe/editorial_opinion/oped/articles/2010/04/05/rescue_catholicism_from_vatican/; Tom Doyle's contribution to this collection (Chapter 9).
19. See Carolyn Jessop and Laura Palmer, *Escape* (New York: Broadway Books, 2007); Melissa Merrill, *Polygamist's Wife* (New York: Pocket Books, 1977); Andrea Moore-Emmett, *God's Brothel: The Extortion of Sex for Salvation in Contemporary Mormon and Christian Fundamentalist Polygamy and the Stories of 18 Women Who Escaped* (San Francisco, CA: Pince-Nez Press, 2004); Susan Ray Schmidt, *Favorite Wife: Escape from Polygamy* (Guilford, CT: Lyons Press,

2009); Dorothy Allred Solomon, *Daughter of the Saints: Growing up in Polygamy* (New York, W. W. Norton, 2003); Elissa Wall and Lisa Pulitzer, *Stolen Innocence: My Story of Growing Up in a Polygamous Sect, Becoming a Teenage Bride, and Breaking Free of Warren Jeffs* (New York: William Morrow, 2008).

20. See Sarah Barringer Gordon, *The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth-Century America* (Chapel Hill: University of North Carolina Press, 2001); Moore-Emmett, *God's Brothel*, 21–31; Irene Spencer, *Cult Insanity: A Memoir of Polygamy, Prophets, and Blood Atonement* (New York: Center Street, 2009), 2–8; Merrill, *Polygamist's Wife*, 34–37.
21. Wilford Woodruff, "Official Declaration" in *The Doctrine and Covenants of the Church of Jesus Christ of Latter-day Saints* (Salt Lake City, UT: The Church of Jesus Christ of Latter-day Saints, 1921), 256–57.
22. Joseph F. Smith, Official Statement at the Seventy-Fourth Annual Conference of the Church of Jesus Christ of Latter-Day Saints (April 6, 1904), http://search.ldslibrary.com/article/view/274597 ("[A]ll such marriages are prohibited, and if any officer or member of the Church shall assume to solemnize or enter into any such marriage he will be deemed in transgression against the Church and will be liable to be dealt with . . . and excommunicated therefrom.").
23. See Jon Krakauer, *Under the Banner of Heaven: A Story of Violent Faith* (New York: Anchor Books, 2004), 5, 253–55; Benjamin G. Bistline, *The Polygamists: A History of Colorado City, Arizona* (Scottsdale, AZ: Agreka, 2004), 16; Spencer, *Cult Insanity*, 3; Susan Ray Schmidt, *Favorite Wife: Escape from Polygamy* (Guilford, CT: Lyons Press, 2009), 1–19.
24. See Daphne Bramham, *The Secret Lives of Saints: Child Brides and Lost Boys in Canada's Polygamous Mormon Sect* (Toronto: Random House Canada, 2009), 3; Moore-Emmett, *God's Brothel*, 25–31; Krakauer, *Under the Banner of Heaven*, 29–30; Bistline, *The Polygamists*, 144.
25. *Reynolds v. United States*, 98 U.S. 145, 164-65 (1879) ("[F]rom the earliest history of England polygamy has been treated as an offence against society. . . . By the statute of 1 James I. (c. 11), the offence [of polygamy]. . . was made punishable in the civil courts, and the penalty was death. . . . [I]t was at a very early period re-enacted, generally with some modifications, in all the colonies.").
26. Ibid. ("[I]t may safely be said there never has been a time in any State of the Union when polygamy has not been an offence against society, cognizable by the civil courts and punishable with more or less severity [than under the former English law]." Ibid. at 165.). See Model Penal Code § 230.1 (1962) (making bigamy a misdemeanor and polygamy a third degree felony).
27. See *Morrill Anti-Bigamy Act of 1862*, *U.S. Statutes at Large* 12, (1862): 501, ch 126; *Edmunds Anti-Polygamy Act of 1882*, *U.S. Statutes at Large* 22, (1882): 30, ch. 47. Congress later amended these acts into the *Edmunds-Tucker Act of 1887*, *U.S. Statutes at Large* 24, (1887): 635,

ch. 397. This Act precipitated the confrontation between the LDS Church and the United States that ultimately led to the Woodruff Manifesto. See also Richard S. Van Wagoner, *Mormon Polygamy: A History*, 2nd ed. (Salt Lake City, UT: Signature Books, 1989), 105–76.

28. See *State v. Geer*, 765 P.2d 1, 6-7 (Utah Ct. App.1988); *State v. Caulder*, 262 S.W. 1023, 1023-24 (Mo. 1924); *Biddy v. State*, 256 S.W. 271, 271-72 (Tex. Crim. App. 1923); *State v. Hayes*, 104 La. 461, 462-63 (La. 1900); *Williams v. State*, 54 Ala. 131 (Ala. 1875); *State v. Robbins*, 28 N.C. (6 Ired) 23(N.C. 1845); *Commonwealth v. Putnam*, 1 Pick. 136, 139–40 (Mass. 1822).
29. *Reynolds*, 98 U.S. at 165–66 (1879).
30. *Bronson v. Swenson*, 500 F.3d 1099 (10th Cir. 2007); *State v. Holm*, 137 P.3d 726 (Utah 2006); *State v. Green*, 99 P.3d 820 (Utah 2004).
31. Spencer, *Cult Insanity*, 7.
32. See *Joseph v. Corp. of the President of the Church of Jesus Christ of Later-Day Saints*, No. Civ. 06-4143, 2008 WL 282163 (D. S.D. Jan. 31, 2008); *Olinger v. Corp. of the President of the Church of Jesus Christ of Latter-Day Saints*, 521 F. Supp. 2d 577 (E.D. Ky. 2007); *Kathleen B. v. Shubeck*, No. E046682, 2009 WL 4647873 (Cal. Ct. App. Dec., 9, 2009); *Franco v. Church of Jesus Christ of Latter-Day Saints*, 21 P.3d 198 (Utah 2001). See also April Daniels and Carol Scott, *Paperdolls: A True Story of Child Sexual Abuse in Mormon Neighborhoods* (San Diego: Recovery Publications, 1993); Lindsay Whitehurst, "Police: Fourth Sex Abuse Allegation against LDS Youth Leader," *Salt Lake City Tribune*, February 13, 2010, http://www.sltrib.com/ci_14394450?IADID=Search-www.sltrib.com-www.sltrib.com; Stephen Hunt, "April Trial Set for Ex-LDS Seminary Principal," *Salt Lake City Tribune*, November 10, 2009, http://www.sltrib.com/ci_13754980?IADID=Search-www.sltrib.com-www.sltrib.com.
33. See, for example, Associated Press, "Judge to Mediate $45m Sex Abuse Suit Against LDS Church," *Salt Lake City Tribune*, July 27, 2007; John Metcalfe, "One Man's Brutal Encounter With Sexual Abuse in the Mormon Church," *Seattle Weekly*, May 30, 2007; Gustav Niebuhr, "Mormons Paying $3 Million to Settle Sex Abuse Case," *New York Times*, sec. A (September 5, 2001).
34. The Church of Jesus Christ of Latter-Day Saints, The Official Church Resource for News Media, Opinion Leaders, and the Public: http://newsroom.lds.org/ldsnewsroom/eng/public-issues/child-abuse (last visited June 3, 2010).
35. Anonymous Email Response [A*******]; Marci A. Hamilton, "How Other Religious Organizations Echo the Roman Catholic Church's Rule Against Scandal—A Precept that Entrenches and Perpetuates Cycles of Child Sex Abuse: Church of Jesus Christ of Latter-Day Saints," *FindLaw.com*, Apr. 15, 2010, http://writ.news.findlaw.com/hamilton/20100415.html. See also Brett Wilcox, John

and Cary, Part 1, *Mormon Matters*, Ch. 7 (May 5, 2010), http://mormonmatters.org/2010/05/05/john-and-cary/.

36. *Scott v. Hammock*, 870 P.2d 947, 949 n.1 (Utah 1994).
37. Church Educational System, *Doctrine and Covenants: Student Manual*, 2nd ed. (Church of Jesus Christ of Latter-day Saints, 2001) 286, http://institute.lds.org/manuals/doctrine-and-covenants-institute-student-manual/index.asp ("D&C 115:5. How Is the Church to Be a Standard to the Nations?"); see also *Doctrine and Covenants* 209, http://scriptures.lds.org/en/dc/115 ("§ 115:5: Arise and shine forth, that thy light may be a standard for the nations[.]").
38. Church of Jesus Christ of Latter-day Saints, *Church Handbook of Instructions*: *Book 1* (Intellectual Reserve Inc., 2006), 105. ("The third purpose of Church discipline is to safeguard the purity, integrity, and good name of the Church. Consequently, transgressions that significantly impair the good name or moral influence of the Church may require the action of a disciplinary council.")
39. Church of Jesus Christ of Latter-day Saints, *Church Handbook of Instructions: Book 1* (1998), 151 ("Legal Matters").
40. Church of Jesus Christ of Latter-day Saints, *Church Handbook* 178 (2006).
41. Church of Jesus Christ of Latter-day Saints, *Gospel Principles* 47 (1997).
42. Ibid., 50.
43. Ibid., 47.
44. Ibid., 49.
45. Ibid.
46. Peggy Fletcher Stack, "Mormon President Warns Students of Pornography, Criticizing Church Leaders: Hinckley Gives Warning To Students," *Salt Lake Tribune,* sec. C, January 27, 1996.
47. Church of Jesus Christ of Latter-day Saints, *Church Handbook* 186 (2006).
48. Ibid.
49. Ibid.
50. Ibid. If a bishop or stake president learns of a "member's abusive activities," he "should urge the member to report these activities to the appropriate government authorities."
51. In Utah, clergy are required to report abuse unless it is obtained during a "confession." *Utah Code Ann.* § 62A-4a-403 (2009). The same is true in Arizona, *Ariz. Rev. Stat. Ann.* § 13-3620 (2009), Oregon, *Or. Rev. Stat.* § 419B.010 (2007) (incorporating by reference the clergy-penitent privilege at Or. Rev. Stat. § 40.260 [2007]), and California, *Cal. Penal Code* § 11166(d) (Deering 2009). Courts' interpretations of "confession" have varied by state. The LDS Church and other religious groups have successfully argued that most private clergy-parishioner communications satisfy the "confession" exception in Utah, Montana, and Washington, but not in California. See *Scott*

v. Hammock, 870 P.2d 947, 949 (Utah 1994); *State v. MacKinnon*, 957 P.2d 23, 28 (Mont. 1998); *State v. Martin*, 975.2d 1020, 1026 (Wash. 1999). But see *Doe 2 v. Superior Court*, 34 Cal. Rptr. 3d 458, 465-69 (Cal. Ct. App. 2005). ("In order for a statement to be privileged, it must satisfy all of the conceptual requirements of a penitential communication: 1) it must be intended to be in confidence; 2) it must be made to a member of the clergy who in the course of his or her religious discipline or practice is authorized or accustomed to hear such communications; and 3) such member of the clergy has a duty under the discipline or tenets of the church, religious denomination or organization to keep such communications secret." [quoting *People v. Edwards*, 248 Cal. Rptr. 53, 56 (Cal. Ct. App. 1988)].)

52. Church of Jesus Christ of Latter-day Saints, *Church Handbook* 186 (2006).
53. See *Scott v. Hammock*, 870 P.2d 947, 949 (Utah 1994) (in daughter's sexual abuse action against her father, the LDS intervened on the side of the father and became joined as a defendant in order to protect the secrecy of documents detailing his non-penitential confession[s] of guilt to his bishop) (holding that "non-penitential communications are privileged under Utah law if they are intended to be confidential and are made for the purpose of seeking spiritual counseling, guidance, or advice from a cleric acting in his or her professional role and pursuant to the discipline of his or her church").
54. See Brief Amicus Curiae of the Church of Jesus Christ of Latter-Day Saints, *Ramani v. Segelstein*, No. 49341(Nev., October 5, 2009); Joinder of the Roman Catholic Bishop of Las Vegas and of the Roman Catholic Bishop of Reno, *Ramani v. Segelstein*, No. 49341 (Nev., October 12, 2009) (arguing for the adoption of a "church autonomy" theory).
55. Anonymous Email Response [P*****], Marci A. Hamilton, "How Other Religious Organizations Echo the Roman Catholic Church's Rule Against Scandal—A Precept that Entrenches and Perpetuates Cycles of Child Sex Abuse: Church of Jesus Christ of Latter-Day Saints," *FindLaw.com* (Apr. 15, 2010), http://writ.news.findlaw.com/hamilton/20100415.html.
56. Spencer, *Cult Insanity*, 5–6 (describing turf wars between polygamous sect leaders); see also Krakauer, *Under the Banner of Heaven* (describing the infighting and political and theological power struggles in the American and Canadian enclaves); Daphne Bramham, "Key Players in the Bountiful Case," *Vancouver Sun*, January 7, 2009 (same).
57. See Singular, *When Men Become Gods*; Hilary Hylton, "Jeffs' Conviction: A Winning Ploy," *Time Magazine* (September 25, 2007), http://www.time.com/time/nation/article/0,8599,1665547,00.html; "State Requests Foster Care for 8 FLDS Children," *CNN.com* (Aug. 5, 2008), http://www.cnn.com/2008/CRIME/08/05/polygamy/index.html.

58. Elissa Wall, "Warren Jeffs' FLDS Church and What I Left Behind," *Huffington Post* (May 17, 2008), http://www.huffingtonpost.com/elissa-wall/warren-jeffs-flds-church_b_102195.html ("When I was fourteen years old, I, like many FLDS girls, was forced by Jeffs to marry a man whom I did not want to wed."); Brooke Adams, "Warren Jeffs Profile: Thou Shalt Obey," *Salt Lake Tribune* (March 14, 2004), http://www.sltrib.com/polygamy/ci_3805407.
59. Texas Department of Family and Protective Service, *Eldorado Investigation* (2008), 3, 6, http://www.dfps.state.tx.us/documents/about/pdf/2008-12-22_Eldorado.pdf (noting the inability of children to determine their ages and familial relationships); Trish Choate, "FLDS: Lawmaker Proud of Sect's Ire," *San Angelo Standard-Times* (December 26, 2009) (detailing planned law in Texas to create criminal penalties for failing to report a birth or file a birth certificate); Terri Langford, "First FLDS Sex Assault Trial Starts on Monday: Polygamist sect leader's son is accused of having sex with minors," *Houston Chronicle* (October 24, 2009) (noting that prosecutors have a difficult time proving underage sex because "many of the children do not have birth certificates").
60. For example, in 2005, Warren Jeffs refused to allow a girl who had been in labor for three days to be taken to the hospital. James C. McKinley, Jr., "Polygamist Sect Leader Convicted of Sexual Assault," *New York Times* (November 5, 2009), at A19; Trish Choate, "FLDS Trial: Defense Grills Ex-Member of Sect," *San Angelo Standard-Times* (November 4, 2009) (noting that Jeffs' reasoning for not taking the girl to the hospital was that she was underage and he was a fugitive).
61. Brooke Adams, "FLDS Man To Be Sentenced For Sexual Assault," *Salt Lake City Tribune* (November 8, 2009), http://www.sltrib.com/polygamy/ci_13743170). ("In all, 12 FLDS men have been indicted on charges ranging from failure to report child sex abuse to sexual assault since authorities raided the ranch last year"); Terri Langford, "Fight For Eight FLDS Children Renewed," *Houston Chronicle* (August 6, 2009), http://www.chron.com/disp/story.mpl/front/5927121.html. ("[Dr.] Barlow was indicted on July 22 on a charge of failure to report sex abuse. . . . Barlow said he had delivered many babies to minor girls. . . . 'Dr. Barlow was asked if he had ever delivered children to girls under the age of 18 on the ranch and he said many times both on this ranch and in other places.'") ("Barlow also informed CPS that domestic violence is something handled internally by the FLDS. [A caseworker] asked Dr. Barlow what a young woman's recourse was should she be a victim of domestic violence, [. . .] Dr. Barlow stated that the church elders would handle the situation first.") See Associated Press, "FLDS Sect Member Convicted of Sex Assault," *Chron.com* (November 6, 2009), http://www.chron.com/disp/story.mpl/metropolitan/6705331.html.

62. See Brooke Adams, "Escape from Polygamy," *Salt Lake City Tribune* (October 16, 2007). See generally Moore-Emmett, *God's Brothel*, 21–23.
63. See, for example, Bramham, *The Secret Lives of Saints*, 2; Carolyn Jessop with Laura Palmer, *Escape*; Moore-Emmett, *God's Brothel*, 49; Van Wagoner, *Mormon Polygamy*, 212; Bistline, *The Polygamists*, 392–98; Stephen Singular, *When Men Become Gods* (New York: St. Martin's Press, 2008), 31–32.
64. See, for example, Bramham, *The Secret Lives of Saints*, 8; Brent W. Jeffs with Maia Szalavitz, *Lost Boy* (New York: Broadway Books, 2009); Bistline, *The Polygamists*, 142–43; Singular, *When Men Become Gods*.
65. See *State v. Bateman*, No. 1 CA-CR 07-0043, 2008 WL 4516447 (Ariz. Ct. App. Oct 2, 2008); *State v. Fischer*, 199 P. 3d 663 (Ariz. Ct. App. 2008); See also Brooke Adams, "Trial for Fourth FLDS Man Starts Monday," *Salt Lake Trib*une (March 8, 2010), http://www.sltrib.com/polygamy/ci_14524088; Associated Press, "Polygamist Sect Member Convicted of Sex Assault," *Salt Lake Trib*une (December 15, 2009), http://www.sltrib.com/polygamy/ci_14001107; Brooke Adams, "Polygamist sentenced to 10 years for sex assault of teen 'bride'," *Salt Lake Trib*une (November 10, 2009), http://www.sltrib.com/polygamy/ci_13756674.
66. See generally, Amy Neustein, ed., *Tempest in the Temple: Jewish Communities and Child Sex Scandals* (Waltham, MA: Brandeis University Press, 2009); see also Robert Kolker, "Accused Pedophile Rabbi Still Go-Carting," *New York Magazine* (August 7, 2006); Hella Winston and Larry Cohler-Esses, "Yeshiva Fired, Then Paid, Rabbi Charged with Abuse," *Jewish Week* (April 2, 2008).
67. Hella Winston, "Brooklyn DA Announces New Plan to Urge Reporting of Abuse," *Jewish Week* (April 1, 2009) ("Acknowledging the community's insularity and the cultural taboo against reporting abuse to the secular authorities").
68. Ibid. See also Rabbi Yosef Blau, Confronting Abuse in the Orthodox Community 3–4 (2003), http://www.jofa.org/pdf/uploaded/863-BWMF1871.pdf (recognizing that the Jewish community must learn to "recognize abuse" and proper[ly] utilize . . . secular authorities").
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70. Special Verdict, *Lewis v. Boy Scouts of America et al.*, No. 0710-11294 (Or. 4th Dist. Cir. Ct., April 13, 2010) (special verdict of the jury).
71. See "The Boston Globe: Abuse in the Catholic Church Archive of Coverage," *Boston Globe*, http://www.boston.com/globe/spotlight/abuse/coverage/jan_02.htm.

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Index